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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 687 36

THE CORN EXCHANGE BANK, APPELLANT,

vs.

BIRD S. COLER, COMMISSIONER OF PUBLIC WELFARE OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED FEBRUARY 9, 1929

(33,996)

(33,996)

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 23, 1929

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IN COURT OF APPEALS OF NEW YORK

REMITTITUR—December 31, 1928

[fol. 2] BIRD S. COLER, Commissioner of Public Welfare of the City of New York, Respondent,

ag'st

THE CORN EXCHANGE BANK, Appellant

Be it remembered, That on the 8th day of November, in the year of our Lord one thousand nine hundred and twenty-eight, The Corn Exchange Bank, the appellant in this cause, came here unto the Court of Appeals, by Laughlin, Gerard, Bowers & Halpin, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the City Court of the City of New York. And Bird S. Coler, Commissioner of Public Welfare of the City of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by George P. Nicholson, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Frank C. Laughlin, of counsel for the appellant, and by Mr. Martin H. Murphy, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the City Court of the City of New York appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the [fols. 3 & 4] City Court of the City of New York, there to be proceeded upon according to law.

Therefore, It is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the City Court of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said City Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Certificate to foregoing paper omitted in printing.

Court of Appeals

OF THE STATE OF NEW YORK. 1

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,
Plaintiff-Respondent,
—against—
THE CORN EXCHANGE BANK,
Defendant-Appellant.

Statement Under the Rule.

This case comes up for review by this Court, 2
pursuant to Article VI, Section 7 of the Constitution of the State of New York, and pursuant to Section 588, Sub. 3, C. P. A., and pursuant to Section 63 of the New York City Court Act.

This action was commenced by the service of a summons and complaint on the defendant dated June 27, 1927.

On motion of defendant, the complaint was dismissed.

On appeal by plaintiff to the Appellate Term, First Department, the order dismissing the complaint was reversed and judgment was directed in favor of plaintiff for the sum demanded in the 3
complaint.

Judgment was thereupon entered in the City Court of the City of New York, County of New York, and an order entered in said court making the judgment and order of the Appellate Term the judgment and order of the City Court.

This appeal is from said judgment and order.

There has been no change of parties or attorneys herein.

Notice of Appeal to Court of Appeals.

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

Index No. 23607—1927.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff,

—against—

THE CORN EXCHANGE BANK,

Defendant.

Sirs:

PLEASE TAKE NOTICE that the above named defendant hereby appeals to the Court of Appeals from the judgment in the above entitled action in favor of the plaintiff and against the defendant entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3rd day of October, 1928, in favor of the plaintiff and against the defendant for the sum of Two thousand two hundred eleven dollars and fifty cents ($2,211.50), and defendant also appeals from an order in the above entitled action made on the 2nd day of August, 1928, and entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3rd day of August, 1928, making the order and judgment of the Appellate Term, First Department, the order and judgment of the City Court of the City of New York, New York County, which order of said Appellate Term, First Department, reversed the judgment dismissing the complaint herein and directed judgment in favor of the plain-

tiff for the sum demanded in the complaint. This 7
said appeal is taken pursuant to the provisions of Article VI, Section 7 of the Constitution of the State of New York and particularly subdivision 3 thereof, and pursuant to Section 63 of the New York City Court Act, and pursuant to Section 588 of the Civil Practice Act and particularly sub-division 3 thereof, upon the ground that the only question involved in this appeal is the validity of a statutory provision of the State under the Constitution of the State and of the United States, and upon this appeal the defendant presents only said constitutional question for consideration and determination by the Court of Ap- 8
peals, and defendant appeals from each and every part of said judgment and order and from the whole thereof.

Dated, New York, the 23rd day of October, 1928.

Yours, &c.,

LAUGHLIN, GERARD, POWERS & HALPIN,
Attorneys for Defendant,
Office and P. O. Address,
57 William Street,
Borough of Manhattan,
New York City. 9

To:

GEORGE P. NICHOLSON, ESQ.,
Corporation Counsel,
Attorney for Plaintiff,
Municipal Building,
New York City.

CLERK OF THE CITY COURT OF THE CITY OF NEW YORK.
County of New York.

Judgment Appealed From.

10

CITY COURT OF THE CITY OF NEW YORK,
NEW YORK COUNTY.

[SAME TITLE.]

The plaintiff in the above-entitled action having appealed to the Appellate Term of the Supreme Court, First Judicial Department, from the judgment herein, dated the 18th day of October, 1927, and entered and filed in the office of the Clerk
11 of the City Court of the City of New York, County of New York, on or about the same day, which said judgment dismissed the complaint herein, with the sum of $23.92 costs; and the said appeal having been duly argued at the said Appellate Term, and that Court having on the 26th day of June, 1928, made and entered an order whereby it ordered and adjudged that the judgment of the City Court of the City of New York, County of New York, is reversed with costs, and judgment directed in favor of the plaintiff for the amount claimed in the complaint; and the
12 costs of the plaintiff having been duly taxed at the sum of $181.50.

NOW, on motion of George P. Nicholson, corporation counsel, attorney for plaintiff, it is

ADJUDGED that the judgment of the City Court of the City of New York, County of New York, so appealed from herein, be and the same hereby is reversed, and that the plaintiff Bird S. Coler,

Commissioner of Public Welfare of the City of New York, recover of the defendant, the Corn Exchange Bank, the sum of $2,030 (being the amount deposited to the credit of Raffaele De Stefano, now in possession of the said Corn Exchange Bank, McKinley Square Branch, corner of 169th street and Clinton avenue, in the Borough of The Bronx, City of New York), together with the sum of $181.50, the amount of said plaintiff's costs as taxed, making a total sum of $2,211.50, and that said plaintiff have execution therefor.

Dated, New York, October 3, 1928.

HARRY C. PERRY,
Clerk.

Order Appealed From.

At a Special Term, Part II, of the City Court of the City of New York, held in and for the County of New York at the Court House thereof on the 2nd day of August, 1928.

Present—Hon. Joseph W. Keller, *Justice.*

[SAME TITLE.]

The plaintiff in the above entitled action having appealed to the Appellate Term of the Supreme Court, First Department, from the judg-

ment of the City Court of the City of New York, County of New York, dated and entered therein the 18th day of October, 1927, dismissing the complaint herein for the sum of $23.92 costs, and the said appeal having been duly argued at the said Appellate Term, and that Court having made and entered an order on the 26th day of June, 1928, reversing the judgment so appealed from with costs and directing judgment in favor of the plaintiff for the sum claimed in the complaint.

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff, it is

ORDERED AND ADJUDGED that the said order and judgment of the Appellate Term be and the same hereby is made the order and judgment of this Court.

Enter,

J. W. K.,
J. C. C.

REMITTITUR FROM APPELLATE TERM TO CITY COURT OF THE CITY OF NEW YORK.

NEW YORK SUPREME COURT,

APPELLATE TERM—FIRST DEPARTMENT.

REED S. COLE, Commissioner of Public Welfare of the City of New York,

Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,

Defendant-Respondent.

Statement Under Rule 234.

This action was commenced by the service of a summons and complaint on the defendant dated June 27, 1927.

Affidavit and notice of motion to dismiss the complaint was made by the defendant July 1, 1927.

The judgment appealed from, which granted the motion and dismissed the complaint with costs, was entered October 18, 1927.

Notice of appeal was served and filed October 21, 1927.

There has been no change of parties or attorneys herein.

16 ment of the City Court of the City of New York, County of New York, dated and entered therein the 16th day of October, 1929, dismissing the complaint herein for the sum of $22.92 costs, and the said appeal having been duly argued at the said Appellate Term, and this Court having made and entered an order on the 28th day of June, 1928, reversing the judgment so appealed from with costs and directing judgment in favor of the plaintiff for the sum claimed in the complaint.

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff, it is

17

Ordered and adjudged that the said order and judgment of the Appellate Term be and the same hereby is made the order and judgment of this Court.

Enter,

J. W. K.,
J. C. C.

18

REMITTITUR FROM APPELLATE TERM TO CITY COURT OF THE CITY OF NEW YORK.

19

NEW YORK SUPREME COURT,

APPELLATE TERM—FIRST DEPARTMENT.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,

Defendant-Respondent.

20

Statement Under Rule 234.

This action was commenced by the service of a summons and complaint on the defendant dated June 27, 1927.

Affidavit and notice of motion to dismiss the complaint was made by the defendant July 7, 1927.

The judgment appealed from, which granted the motion and dismissed the complaint with costs, was entered October 18, 1927.

21

Notice of appeal was served and filed October 21, 1927.

There has been no change of parties or attorneys herein.

Notice of Appeal to the Appellate Term.

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,
Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,
Defendant-Respondent.

PLEASE TAKE NOTICE that the plaintiff-appellant, Bird S. Coler, as Commissioner of Public Welfare of the City of New York, hereby appeals to the Appellate Term of the Supreme Court, First Department, from a judgment of this Court entered in the office of the Clerk of the City Court of The City of New York, New York County, on the 18th day of October, 1927, rendering judgment dismissing the complaint in the above named action, and the said plaintiff-appellant hereby appeals from each and every part of the said judgment above referred to.

Dated, New York, October 20, 1927.

Yours &c.,

GEORGE P. NICHOLSON,
Corporation Counsel and
Attorney for Plaintiff-Appellant,
Municipal Building,
Borough of Manhattan,
New York City.

REMITTITUR.

Notice of Appeal to the Appellate Term. 25

To:

LAUGHLIN, GERARD, BOWERS & HALPIN, ESQS.,
Attorneys for Defendant-Respondent,
57 William Street,
Borough of Manhattan,
New York City.

HON. HARRY C. PERRY,
Clerk of the City Court of the
City of New York, New York County.

26

27

28 **Order Dismissing Complaint Being Order Appealed From.**

Index Number 23607—Year 1927.

CITY COURT OF THE CITY OF NEW YORK.

SPECIAL TERM.

Present—HON. EDWARD G. LA FETRA, *Justice.*

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

29 Plaintiff,

—against—

CORN EXCHANGE BANK,

Defendant.

The following papers used on this motion argued this day.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2
30 Answering Affidavits	5
Exhibits	3-4

Upon the foregoing papers this motion is granted and complaint dismissed with costs.

Dated October 11, 1927.

E. G. L.,
J. C. C.

REMITTITUR.

Judgment Appealed From. 31

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

Judgment 23607—1927.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff,

—against—

CORN EXCHANGE BANK, 32

Defendant.

The defendant in the above-entitled action having duly moved by notice of motion dated July 7, 1927, to dismiss the complaint herein, and said motion having duly and regularly come on for hearing before Mr. Justice Edward B. La Fetra at a Special Term, Part I, of this Court held on the 11th day of October, 1927, at the Court House in the Brownstone Building, City and County of New York, and the Court having heard Henry M. Carpenter, of counsel for the defendant, in support of said motion and Benjamin Millstein, of counsel for plaintiff in opposition thereto, and after due deliberation, having duly made and filed on the 13th day of October, 1927, an order granting defendant's motion to dismiss the complaint herein with costs, and defendant's costs having been duly adjusted at Twenty-three and 92/100 Dollars ($23.92). 33

REMITTITUR.

34 *Judgment Appealed From.*

Now, on motion of Laughlin, Gerard, Bowers & Halpin, attorneys for defendant, it is

ADJUDGED that the complaint of the plaintiff be, and the same hereby is dismissed, and that the defendant, The Corn Exchange Bank, recover of the plaintiff its costs of this action, as taxed, amounting to the sum of $23.92, and that it have execution therefor.

Judgment this 18th day of October, 1927.

35 HARRY C. PERRY,
Clerk.

36

13

REMITTITUR.

Summons. 37

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,

Defendant-Respondent. 38

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within six days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, June 27, 1927. 39

GEORGE P. NICHOLSON,
Corporation Counsel,
Plaintiff's Attorney,
Office and Post Office Address,
Municipal Building,
Centre and Chambers Street,
Borough of Manhattan,
New York City.

40 **Complaint.**

CITY COURT OF THE CITY OF NEW YORK,
NEW YORK COUNTY.

[SAME TITLE.]

The above-named plaintiff, by this complaint, shows to this Court and alleges:

First: That at all the times hereinafter mentioned, the plaintiff was and is the Commissioner of Public Welfare of the City of New York.

41 Second: Upon information and belief that the above-named defendant is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

Third: Upon information and belief that the defendant has on deposit to the credit of Raffaele De Stefano the sum of Two thousand and thirty ($2,030) Dollars.

Fourth: Upon information and belief that Mary De Stefano is the wife of Raffaele De Stefano and that a child is the issue of said marriage and that the said Raffaele De Stefano abandoned his wife and infant child and absconded from the State of New York.

42

Fifth: Upon information and belief that on or about the 21st day of September, 1923, in accordance with Sections 921 and 922 of the Code of Criminal Procedure upon due proof that the said Raffaele De Stefano abandoned his wife and infant child, leaving them in danger of becoming a charge upon the public and absconded from the State of New York, a warrant of seizure was issued out of The Family Court, Borough of Manhattan, City of New York, by Hon. Louis B. Brodsky and

REMITTITUR.

Complaint.

Hon. Charles A. Oberwager, two City Magistrates of the City of New York, directing the said Bird S. Coler, Commissioner of Public Welfare of the City of New York, to take and seize all the right, title and interest of the said Raffaele De Stefano in and to the sum of Two thousand thirty ($2,030) Dollars, which is now in the possession of the defendant, and that said warrant directed Bird S. Coler, Commissioner of Public Welfare of the City of New York, to make an inventory of the property seized and return the same to the Court of General Sessions the County of New York. 43 44

Sixth: Upon information and belief that on or about the 22nd day of September, 1926, said warrant of seizure was served on the defendant, The Corn Exchange Bank, and the said defendant, The Corn Exchange Bank, has refused to deliver to the said Bird S. Coler, Commissioner of Public Welfare of the City of New York, as directed in the said warrant of seizure, the sum of Two thousand and thirty ($2,030) Dollars as requested so to do, a copy of the said warrant being hereto annexed and made part of the complaint and marked "Plaintiff's Exhibit A". 45

WHEREFORE, plaintiff demands judgment against the defendant, The Corn Exchange Bank, for the sum of Two thousand and thirty ($2,030) Dollars, together with the costs of this action.

GEORGE P. NICHOLSON,
Corporation Counsel,
Office and Post Office Address,
Room 1500, Municipal Building,
Chambers & Centre Street,
Borough of Manhattan,
New York City.

REMITTITUR.

46 COMPLAINT.

PLAINTIFF'S EXHIBIT "A".

CITY MAGISTRATES' COURT OF THE CITY OF NEW YORK.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York, on the complaint of Marie De Stefano,

Complainant,

—against—

47

RAFFAELE DE STEFANO,

Defendant.

County of New York—ss.:

To the Commissioner of Public Welfare of the City of New York:

It appearing to us two City Magistrates of the City of New York, upon application made to us by BIRD S. COLER, Commissioner of Public Welfare
48 of the City of New York, and upon due proof of the facts before us, that Raffaele De Stefano, the above named defendant, abandoned his wife and one minor child in the City of New York, leaving them without adequate support and in danger of becoming a burden upon the public, and absconded, and the said wife is now likely to become a charge upon the public.

REMITTITUR.

Plaintiff's Exhibit A.

WE, THEREFORE, AUTHORIZE YOU, the said Commissioner of Public Welfare of the City of New York, to take and seize all the right, title and interest of Raffaele De Stefano in and to the sum of Two thousand and thirty ($2,030.00) Dollars, or any part thereof, now in the possession of the Corn Exchange Bank of the City of New York, McKinley Square Branch at the corner of 169th Street and Clinton Avenue, in the Borough of the Bronx, City of New York, and that you immediately, upon such seizure, make an inventory of the property taken, and return the same, together with these proceedings to the County Court, Bronx County, and have you then and there this warrant.

GIVEN under our hands and seals, in the Borough of the Bronx, City of New York, on the 21st day of September, 1926.

LOUIS B. BRODSKY,
City Magistrate of the
City of New York.

CHARLES A. OBERWAGER,
City Magistrate of the
City of New York.

52 **Notice of Motion Read on Behalf of Defendant.**

[SAME TITLE.]

Sir:

PLEASE TAKE NOTICE that upon the summons and complaint in the above-entitled action and the exhibit annexed thereto and upon the affidavit of Henry M. Carpenter, verified the 7th day of July, 1927, and the exhibit annexed thereto, and upon all
53 the papers and proceedings herein, the undersigned will move this Court at Special Term, Part I, thereof, to be held at the Courthouse in the Brownstone Building, No. 32 Chambers Street, Borough of Manhattan, City of New York, on the 12th day of July, 1927, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to dismiss the complaint herein upon the following grounds:

1. That there is a non-joinder of and defect of parties plaintiff, in that Raffaele De Stefano, mentioned in the complaint, has an interest in the
54 cause of action alleged in the complaint and in the fund referred to therein and is a necessary party to the proper and complete determination of the action and he has not been made a party thereto or served with any process therein.

2. That the complaint fails to set forth facts sufficient to constitute a cause of action.

3. That the complaint fails to set forth facts sufficient to constitute a cause of action, in that Sections 921 and 922 of the Code of Criminal Pro-

cedure, referred to in the complaint, are unconstitutional under the Constitution of the State of New York, and particularly Section 6 thereof, and the Constitution of the United States, and particularly the Fourteenth Amendment thereto, in that said sections of the Code of Criminal Procedure attempt to deprive persons, including the defendant and its depositor Raffaele De Stefano, of property without due process of law. 55

4. That said complaint shows upon its face, and it appears from the annexed affidavits and exhibits, that no notice of the proceedings upon which the warrant referred to in the complaint was based, was given to the defendant or its depositor Raffaele De Stefano, either constructively or otherwise, and no process of any kind in the aforesaid proceedings was served upon either the defendant or its depositor, the said Raffaele De Stefano, and the complaint therefore fails to state facts sufficient to constitute a cause of action, and it therefore appears that the plaintiff has no cause of action against the defendant. 56

5. That the plaintiff herein has no legal capacity to sue and has no title or interest in the fund referred to in the complaint, and this Court has no jurisdiction of the subject of the action, because, for the reasons before mentioned, the plaintiff derives whatever capacity or interest he has from Sections 921 and 922 of the Code of Civil Procedure and the plaintiff has no legal capacity to sue or interest in the fund referred to in the complaint because the said sections are unconstitutional. 57

58 *Notice of Motion.*

AND PLEASE TAKE FURTHER NOTICE that the defendant will move for such other and further relief in the premises as to the Court may seem just and proper.

Dated July 7, 1927.

Yours, etc.,

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for Defendant,
Office & P. O. Address,
59 57 William Street,
Borough of Manhattan,
New York City.

To:
HON. GEORGE P. NICHOLSON,
Corporation Counsel,
Attorney for Plaintiff,
Municipal Building,
Borough of Manhattan,
New York City.

60

REMITTITUR.

Affidavit of Henry M. Carpenter Read on Behalf of Defendant. 61

[SAME TITLE.]

State of New York,
County of New York—ss.:

HENRY M. CARPENTER, being duly sworn, deposes and says that he is an attorney-at-law and associated with Messrs. Laughlin, Gerard, Bowers & Halpin, attorneys for the defendant in the above-entitled action, and that he has charge of the same and is familiar therewith. 62

That the complaint herein was not served personally upon the defendant, but the attorneys for the defendant duly served a notice of appearance for the defendant upon the Corporation Counsel on the 7th day of July, 1927, and have not answered the complaint herein or taken any other action with respect thereto than the making of this motion.

That, upon information and belief, neither the defendant herein nor Raffaele De Stefano were made parties to the proceedings in the Magistrate's Court, referred to in the complaint herein, or had notice thereof, either constructively or otherwise, or appeared therein. That no process or other notice of any kind whatsoever in the said proceedings in the Magistrate's Court or in this Court in this action were served upon the defendant or the said Raffaele De Stefano other than the complaint herein and copy of warrant which were servd upon the defendant herein. 63

64 *Affidavit of Henry M. Carpenter.*

That the forregoing allegations are based upon conversations with officers and employees of the defendant and upon the affidavit of Christopher J. Dunn, verified the 17th day of September, 1926, and the affidavit of Marie De Stefano, verified the 17th day of September, 1926, annexed to the moving papers herein, and upon the ground that it nowhere appears in the complaint herein or in the papers and proceedings in the Magistrate's Court that any such notice was given.

65 WHEREFORE, deponent requests that, for the reasons set forth in the notice of motion annexed hereto, the complaint herein be dismissed.

Sworn to by Henry M. Carpenter, July 7, 1927.

66

REMITTITUR.

EXHIBIT ANNEXED TO AFFIDAVIT OF HENRY M. CARPENTER. 67

DOMESTIC RELATIONS COURT,

BOROUGH OF BRONX.

CITY OF NEW YORK,

Plaintiff,

—against—

RAFFAELE DE STEFANO,

Defendant. 68

County of New York—ss.:

CHRISTOPHER J. DUNN respectfully shows to this Court and alleges:

First: That he is the Deputy and Acting Commissioner of Public Welfare of the City of New York.

Second: Upon information and belief derived from the affidavit of Marie De Stefano, hereto annexed, sworn to on the 17th day of September, 1926, petitioner alleges that Marie De Stefano is the wife of the defendant. 69

Third: Upon information and belief derived from the said affidavit of Marie De Stefano, hereto annexed, that on or after the 5th day of January, 1926, while said deponent and the defendant resided at Number 1150 Intervale Avenue, Borough

70 *Exhibit Annexed to Affidavit of H. M. Carpenter.*

of the Bronx, City of New York, the said defendant, Raffaele De Stefano, without justification, abandoned his wife and his infant child and absconded from the State of New York, leaving them without means and in danger of becoming charges upon the public.

Fourth: Upon information and belief derived from the affidavit of Marie De Stefano, hereto annexed, the defendant, Raffaele De Stefano, has in his own name a bank account in the Corn Exchange Bank of the City of New York, McKinley
71 Square Branch, at the corner of 169th Street and Clinton Avenue, in the Borough of the Bronx, City of New York, and that there is now due to the credit of the said account the sum of Two thousand thirty ($2,030.00) Dollars.

WHEREFORE, the petitioner prays that in accordance with Section 921 and 922 of the Code of Criminal Procedure and the following sections, a warrant may issue authorizing the Commissioner of Public Welfare of the City of New York to seize the said property of the defendant, to wit, the sum of Two thousand and thirty ($2,030.00) Dollars,
72 now on deposit to the credit of Raffaele De Stefano in the Corn Exchange Bank of the City of New York, McKinley Square Branch, at the corner of 169th Street and Clinton Avenue, in the Borough of the Bronx, City of New York, and requiring him to make an inventory of the property so seized and return it, together with this proceeding, at the next term of the Court of General Sessions in and for the County of Bronx, in order that the property so seized may be applied to the support and main-

Exhibit Annexed to Affidavit of H. M. Carpenter.

tenance of the said Marie De Stefano and his minor child, Leo De Stefano. 73

Dated, New York, September 17, 1926.

CHRISTOPHER J. DUNN,
Petitioner.

County of New York—ss.:

CHRISTOPHER J. DUNN, being duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 74

CHRISTOPHER J. DUNN.

Sworn to before me this
17th day of September, 1926.

D. J. O'DAIR,
Notary Public,
New York County. 75

76 EXHIBIT ANNEXED TO AFFIDAVIT OF HENRY M. CARPENTER.

DOMESTIC RELATIONS COURT,
BOROUGH OF BRONX.

CITY OF NEW YORK,
Plaintiff,

—against—

RAFFAELE DE STEFANO,
Defendant.

77 County of New York—ss.:

MARIE DE STEFANO, being duly sworn, deposes and says:

First: That she is the wife of the above-named defendant, Raffaele De Stefano; that she is 54 years of age, and resides at Number 1142 Intervale Avenue, Borough of the Bronx, City of New York.

Second: That on or about the 5th day of January, 1926, while deponent and said defendant Raffaele De Stefano were residing at Number 1150 Intervale Avenue, Borough of Bronx, City of New
78 York, defendant Raffaele De Stefano, without justification abandoned deponent and his infant child and absconded from the State of New York, leaving them without means and in danger of becoming charges upon the public.

Third: That since that time defendant has contributed nothing towards the support of the deponent and his child; that the said child Leo De Stefano is the son of the defendant and is twelve years of age.

Fourth: That deponent further alleges the defendant Raffaele De Stefano has in his own name

Exhibit Annexed to Affidavit of H. M. Carpenter. 79

a bank account in the Corn Exchange Bank of the City of New York, McKinley Square Branch at the corner of 169th Street and Clinton Avenue in the Borough of the Bronx, City of New York, and that there is now due to the credit of said account the sum of Two thousand thirty ($2,030) Dollars.

Fifth: Deponent further alleges that she has no interest in any real estate, no stocks or bonds, no jewelry of any kind except the interest in the account above stated.

WHEREFORE, deponent prays that in accordance with Sections 921 and 922 of the Code of Criminal 80
Procedure and the following Sections a warrant may issue authorizing the Commissioner of Public Welfare of the City of New York, to seize the said property of the defendant, to wit.: The sum of Two thousand and thirty ($2,030) Dollars now on deposit in the said Corn Exchange Bank, McKinley Square Branch at the corner of 169th Street and Clinton Avenue in the Borough of the Bronx, City of New York, and require him to make an inventory of the property so seized and return it together with his proceedings at the next term of the Court of General Sessions in order that the 81
property so seized may be applied towards the maintenance of deponent and defendant's said child.

her
MARIE (X) DE STEFANO.
mark.

Sworn to before me, this 17th
day of September, 1926.

DAVID G. ZUCKER,
Commr. of Deeds,
N. Y. City.

82 **Affidavit of Charles D. Nutt, Read on Behalf of Defendant.**

CITY COURT OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Bronx—ss.:

83 CHARLES D. NUTT, being duly sworn, deposes and says:

That he is Manager of the McKinley Square Branch of The Corn Exchange Bank, the defendant in the above-entitled action. That on ~~or~~ about the 21st day of September, 1927, your deponent received from Raffaele De Stefano, mentioned in the complaint in the above-entitled action, a letter apparently mailed from Cairo, Egypt, enclosing passbook of said Raffaele De Stefano, showing the deposit of Raffaele De Stefano with the defendant, and an order thereon to the order of
84 Cash in the sum of $2,000, which said order was signed by said Raffaele De Stefano. The said letter requests the transmission to Raffaele De Stefano of the sum of $2,000 out of his account, the said $2,000 to be sent to said Raffaele De Stefano at Cairo, Egypt.

(Sworn to by Charles D. Nutt, 27 September, 1927.)

REMITTITUR.

Affidavit of No Opinion.

State of New York,
County of New York—ss.:

BENJAMIN MILLSTEIN, being duly sworn, deposes and says that he is an Assistant Corporation Counsel of the City of New York, in charge of the foregoing action; that no written opinion or memorandum was handed down by the Special Term of the City Court, New York County, except the following by La Fetra, *J.*:

"Motion granted, and complaint dismissed with costs. Order filed."

BENJAMIN MILLSTEIN.

Sworn to before me this 1st
day of November, 1927.

I. ROBERT WOLFE,
Commissioner of Deeds,
New York City.

88 **Waiver of Certification.**

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Appellate Term, the judgment appealed from and the judgment roll, except such parts as are omitted pursuant to Rule 234 of the Rules of Civil Practice all of which are now on file in the office of the Clerk of the City Court; and certification thereof pursuant to Sections 170 and 616 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, April 13, 1928.

89

GEORGE P. NICHOLSON,
Corporation Counsel,
Attorney for Plaintiff-Appellant.

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for Defendant-Respondent.

90

REMITTITUR.

Order of Appellate Term. 91

At an Appellate Term of the Supreme Court, First Judicial Department, held at the County Court House, Borough of Manhattan, City of New York, on the 26th day of June, 1928.

Present—HON. NATHAN BIJUR,
" " AARON J. LEVY,
" " THOMAS C. T. CRAIN, Dissents,
Justices.

Order of Reversal on Appeal from the City Court. 92
June, #13.

[SAME TITLE.]

The above named plaintiff in this action having appealed to the Appellate Term of the Supreme Court, First Judicial Department, from a judgment of the City Court of the City of New York, County of New York, entered in the office of the Clerk of said Court on the 18th day of October, 1927, and the said appeal having been heard and due deliberation having been had thereon, 93

IT IS HEREBY ORDERED AND ADJUDGED, that the judgment so appealed from be and the same is hereby reversed with costs and judgment directed in favor of the plaintiff for the amount claimed in the complaint.

Enter,

N. B.,
Justice Supreme Court
Sitting in Appellate
Term.

A copy.
(Seal)

WILLIAM T. COLLINS,
Clerk.

Affidavit of No Opinion.

94

State of New York,
County of New York—ss.:

RALPH L. KNISLEY, being duly sworn, deposes and says that he is an attorney at law and managing clerk for Laughlin, Gerard, Bowers & Halpin, attorneys for defendant-appellant; that no written opinion or memorandum was handed down by any Justice of the City Court of the City of New York in connection with the judgment and order appealed from.

95

RALPH L. KNISLEY.

Sworn to before me this
24th day of October, 1928.

PATRICK H. SULLIVAN,
Notary Public.
N. Y. Co. Clk's No. 474, Reg. No. 0-47.
Kings Co. Clk's No. 266, Reg. No. 111.
Bronx Co. Clk's No. 53, Reg. No. 3087A.
Commission expires March 30, 1930.

96

Stipulation Waiving Certification of Record to Court of Appeals.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Notice of Appeal to the Court of Appeals; the remittitur from the Appellate Term, First Department, to the City Court of the City of New York; the Order and Judgment of the City Court of the City of New York, County of New York, entered upon the said remittitur; all of which are now on file with the Clerk of the City Court of the City of New York, County of New York. Certification thereof hereby is waived.

Dated, New York, November , 1928.

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for the Defendant-Appellant.

GEORGE P. NICHOLSON,
Attorney for the Plaintiff-Respondent.

Certificate of Clerk.

100

State of New York,
County of New York,
City of New York—ss.:

I, HARRY C. PERRY, Clerk of the City Court of the City of New York in and for the County of New York, do hereby certify that the foregoing consists of certified copies of the notice of appeal to the Court of Appeals, the remittitur from the Appellate Term, First Department to the City Court of the City of New York, the order and judgment of the City Court of the City of New
101 York, County of New York, entered upon the said remittitur, all of which are now on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this day of November, 1928.

HARRY C. PERRY,
Clerk of the City Court of the City of New York.

(Seal)

102

COURT OF APPEALS

OF THE STATE OF NEW YORK.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff-Respondent,

—against—

THE CORN EXCHANGE BANK,

Defendant-Appellant.

SUPPLEMENT TO PAPERS ON APPEAL

FROM JUDGMENT AND ORDER OF CITY COURT OF CITY OF NEW YORK, COUNTY OF NEW YORK.

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for Defendant-Appellant,
No. 57 William Street,
New York City.

HON. GEORGE P. NICHOLSON,
Corporation Counsel,
Attorney for Plaintiff-Respondent,
Municipal Building,
New York City.

New York Supreme Court.

APPELLATE ~~DIVISION~~ TERM—FIRST DEPARTMENT. 1

Present—HON. NATHAN BIJUR,
" AARON J. LEVY,
" THOMAS C. T. CRAIN,
Justices.

#13 CC

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,
Plaintiff-Appellant,

—against— 2

CORN EXCHANGE BANK,
Defendant-Respondent.

Opinion of Appellate Term.

June, 1928.

Appeal by plaintiff from judgment of the City Court, County of New York, dismissing the complaint.

3

GEORGE P. NICHOLSON, Corporation Counsel (Joseph I. Berry, Martin H. Murphy and William E. Fay, of counsel), for appellant.

LAUGHLIN, GERARD, BOWERS & HALPIN (Henry M. Carpenter, of counsel), for respondent.

BIJUR, J.:

This action was instituted by plaintiff in conformity with a suggestion contained in an un-

reported decision of Mr. Justice O'Gorman, Law Journal, January 22, 1904, to make effective the provisions of Sections 921, 922 and 923 of the Code of Criminal Procedure, which so far as material read as follows:

"Sect. 921. Parents leaving their children chargeable to the public, how proceed against.

a. When the father, or the mother, absconds from the children, or a husband from his wife, or a wife from her husband, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother, husband or wife is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding."

b. * * *

"Sect. 922. Seizure of their property; transfer thereof, when void.

The officers so applying may seize and take the property, wherever it may be found in the same county; and are vested with all the rights and title thereto which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after the issuing of the warrant,

whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the county where they reside, there to be filed."

"Sect. 923. Warrant and seizure, when confirmed or discharged; direction of the Court thereon.

The Court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied toward the maintenance of the children or spouse of the person absconding."

The chief point urged by the respondent is that the statute is unconstitutional because it deprives the absconding party of his property without due process of law, namely without notice, actual or constructive, and is therefore, violative of Section 6 of Article I of the Constitution of this State and of the Fourteenth Amendment of the Federal Constitution.

The complaint recites that one Stefano had absconded leaving his wife and infant child in danger of becoming public charges; that a warrant of seizure was issued on or about September 21, 1923, by two City Magistrates, directing plaintiff to seize all the right, title and interest of the

absconder to the sum of $2,030 deposited to his credit with the defendant; that the warrant was
10 served on or about September 22, 1926, upon the defendant which had refused to honor it, whereupon judgment for the amount of the deposit was sought.

The history of these statutes dates back to an act of Parliament (5 George I, Chapter 8—1719) applicable to these colonies. It was re-enacted in substantially the same form by The Colonial Legislature on March 8, 1773. The State Legislature passed the equivalent statute on April 17, 1784, and again as Chapter 62 of the Laws of 1788. It was repeated in the Revised Statutes,
11 Part 1, Chapter 20, Title I, Sections 8 to 11. It has been the subject of judicial approval in People ex rel., Read v. Overseers, etc., 23 Barb. 236 (1856); Downing v. Ruger, 21 Wend. 178 (1839), and is referred to in Goodman v. Alexander, 165 N. Y. 289 (1901). During this prolonged period no question concerning its constitutionality seems to have been raised.

Statutes of this character, ante-dating the adoption of any and all American constitutions or indeed the establishment of our Republic, but providing remedies or precedure in harmony with the requirements and limitations of the then ex-
12 isting common law, are not to be held unconstitutional merely because they do not conform to the interpretation of constitutional limitations as applied to legislation subsequently enacted (Murray's Lessee v. Hoboken Improvement Co., 18 How. 272; Hartado v. California, 110 U. S. 516; See also Biddles, Inc. v. Enright, 239 N. Y. 354 at 361). I find, however, in this legislation an element which may account for the fact that its possible unconstitutionality did not suggest itself

to our courts in the past, namely this, that it does not embody provisions covering private litigation, nor prescribe a practice for litigation in its ordinary sense at all. It may well be regarded as a regulation for the exercise of the police power of the State. This is intimated in Goodman v. Alexander, supra, where the Court of Appeals, per Parker, *J.*, describes as follows: 13

> "Section 921 of the Code of Criminal Procedure in substance provides that if a father, a widowed mother, or a mother living apart from her husband absconds, leaving children a charge on the public, his or her property is liable for the support of such children." 14

The very language of the statute referring to the absconding of the head of a family leaving his dependents "chargeable or likely to become chargeable upon the public" indicates that the legislature contemplated an emergency more critical from the human standpoint in many respects than fire, epidemic, flood and similar emergencies, with which the state is justified in dealing ministerially, not on the theory of eminent domain, where due compensation is the constitutional corrective, but on the doctrine of Salus rei-publicae suprema lex (Stone v. Mayor & Alderman, etc., 25 Wend. 157; American Print Works v. Lawrence, 23 N. J. L. (3 Zab.) 590, 607; 21 N. J. Law (1 Zab.) 248, and cases there cited). It seems also that it would not be justifiable to declare this act essentially unconstitutional for failure to provide notice to the absconder, because the provision for seizure is a preliminary step to enforce the state's hold upon property within its jurisdiction (Matthews v. Matthews, 240 N. Y. 28; 15

Miller v. Lautenberg, 239 N. Y. 132) and it may well be assumed that when the matter comes on
16 to be heard before the County Court the latter will follow the suggestion of the Supreme Court of the United States in Guthrie National Bank v. Guthrie, 173 U. S. 528 at 539:

> "Although the act makes no provision for notice to the parties interested as to the time or manner in which the District Court will proceed to investigate the character of the claims, yet in the absence of any such provision the Court having the duty to investigate will have power to regulate the
17 time of the hearing and provide for reasonable notice by its rules, so as to prevent surprise."

Moreover, in a proceeding in rem or quasi in rem, particularly where the owner has absented himself from the jurisdiction, and the state is undertaking to perform his duties to his dependents and the public, I should be reluctant to hold that the bare formalism of publishing a notice in an obscure journal, or some similar futile expedient, would be required to instill legality into the proceeding. Surely the seizure of property
18 found within our jurisdiction is, in itself, a far more promising and efficient form of notice. See Miller v. Lautenberg (supra), at 137, and Pennoyer v. Negg, 95 U. S. 714.

These considerations lead naturally also to the question whether the present defendant in this proceeding which has for its purpose the mere seizure of the depositor's account, has such an interest in the statute governing the further proceedings as under familiar principles would entitle it to raise the question of the constitutional-

ity of the entire enactment (In re Keen, 194 N. Y. 281; see Shaw v. Board of Drainage, 160 Ky. 422 at 432; Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50). The further point made by the respondent in connection with the unconstitutionality of the act, that the "vesting" in plaintiff of title upon seizure is in itself unconstitutional, is answered adversely by the provision that upon the trial, the Court "may confirm or discharge the warrant and seizure"—in other words, the seizure is a mere preliminary remedy. Respondent's objection that the depositor is a necessary party to this action, manifestly falls, if the reasoning as to the constitutionality of the act be correct.

Judgment reversed, with costs, and judgment directed in favor of the plaintiff for the amount claimed in the complaint.

Bijur and Levy, *J.J.*, concur.

Crain, *J.* (dissenting): I dissent on the ground that the statute (Secs. 921, 922, 923, 924 and 925 of the Code of Criminal Procedure) authorizes the seizure of tangible property only and confers no power to attach or otherwise collect a debt. The defendant was not possessed of any property of Raffaele De Stefano. The relation between it and De Stefano was merely that of debtor and creditor. The judgment dismissing the complaint should be affirmed, with costs.

Filed.

[fol. 47] Reporter's certificate to opinion of Court of Appeals omitted in printing.

Judge's certificate to reporter and clerk omitted in printing.

[fol. 48] In Court of Appeals of New York

Bird S. Coler, Commissioner of Public Welfare of the City of New York, Respondent,

v.

The Corn Exchange Bank, Appellant

(Decided December 31, 1928)

Appeal from a final judgment of the City Court of the City of New York, in favor of the plaintiff, such appeal being taken directly to this court under Constitution, article VI, section 7 (3), and Civil Practice Act, section 588, subdivision 3, on the ground that only a constitutional question is involved therein.

Frank C. Laughlin for appellant.
Martin H. Murphy for respondent.

Opinion

Cardozo, Ch. J.:

Plaintiff, the Commissioner of Public Welfare, made complaint to the Domestic Relations Court that Raffaele De Stefano had abandoned his wife and infant child while residing with them in the city of New York, and had absconded from the State leaving wife and child without means, and likely, unless relieved, to become charges on the public purse.

A warrant was signed and issued by two magistrates of the court, upon a supporting affidavit by the wife, authorizing the Commissioner of Public Welfare to take and seize all the right, title and interest of the absconding husband in a fund deposited to his credit with the defendant, the Corn Exchange Bank, and upon such seizure to make an

inventory of the property taken and to make return of the proceedings with the warrant to the County Court for Bronx county.

Plaintiff has brought this action against the bank to reduce the fund to his possession with appropriate allegations that payment was refused after due demand and service. The defendant has moved for judgment upon the ground that the statute, the basis of the warrant, is a denial of "due process" under the Constitution of the State and Nation (N. Y. Constitution, art. I, §6; U. S. Constitution, amendment XIV). Judgment for the defendant was reversed by the Appellate Term of the Supreme Court (Coler v. Corn Exchange Bank, 132 Misc. Rep. 449), and thereafter final judgment in favor of the plaintiff was rendered by the City Court. The appeal taken directly from that judgment is within the jurisdiction of this court, a constitutional question, and no other, being involved therein (American Historical Society v. Glenn, 248 N. Y. 445, 448.)

The warrant of seizure was issued under Code Criminal Procedure, §§921, 922, 923, 924, 925. These sections provide in substance that the Commissioner of Public Welfare may apply to two magistrates for a warrant to seize the property of an absconding husband or father leaving wife or child likely to become charges on the public; that upon due proof of the facts, the warrant may be issued; that the officer receiving it may seize the property wherever found [fol. 49] within his county, and shall be vested with all the rights and title thereto which the person absconding then had; that return of all proceedings under the warrant shall be made to the next term of the County Court; that thereupon that court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; that in the event of confirmation the court shall from time to time direct what part of the property shall be sold, and how the proceeds shall be applied to the maintenance of spouse or children; and on the other hand that if the party against whom the warrant has issued shall return and support the spouse or children so abandoned, or give satisfactory security for such support, then the warrant shall be discharged, and the property restored.

The procedure thus authorized has its roots in a distant past.

In 1718 the Parliament of England enacted a statute which recites a like evil and prescribes a like remedy (5 Geo. I, ch. 8). The recital is that:

"Divers persons run or go away from their places of abode into other counties or places, and sometimes out of the kingdom, some men leaving their wives, a child, or children, and some mothers run or go away, leaving a child or children, upon the charge of the parish or place where such child or children was or were born, or last legally settled, although such persons have some estates, which should ease the parish of their charge, in whole or in part."

Whereupon the enacting clause provides:

"That it shall and may be lawful for the churchwardens or overseers of the poor of such parish or place where any such wife, or child, or children, shall be so left, upon application to, and by warrant or order from any two justices of the peace, to take and seize so much of the goods and chattels, and receive so much of the annual rents and profits of the lands and tenements of such husband, father, or mother, as such two justices of the peace as aforesaid shall order and direct, for or towards the discharge of the parish or place where such wife, child, or children are left, for the bringing up and providing for such wife, child, or children; which warrant or order being confirmed at the next quarter sessions, it shall be lawful for the justices of such quarter sessions to make an order for the churchwardens or overseers for the poor to such parish or place to dispose of such goods and chattels by sale, or otherwise, or so much of them, for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits, or so much of them, as shall be ordered by the sessions, as aforesaid, of his or her lands and tenements, for the purposes aforesaid." (See also, 22 Halsbury, Laws of England, §1209.)

The Statute of George I was enacted in substantially the same form on March 8, 1773, by the Colonial Legislature of [fol. 50] New York. After the separation from England, the State Legislature placed a like act upon the statute books of the State, first in 1784 (Act of Apr. 17, 1784) and again in 1788 (L. 1788, ch. 62). From there, the act passed into the Revised Laws of 1813 (Act of Apr. 8, 1813;

R. L. chap. 78, § 22), and thence in 1829 into the Revised Statutes (1 R. S. ch. 20, title 1, §§ 8 and 9), where the subject of the seizure was broadened to include things in action generally as well as rents and goods and chattels. The Code of Criminal Procedure has carried down the statute to our own day unchanged in point of substance. During all this long history there has been, so far as the published records show, no challenge of its binding force, though the enforcement of its remedies has been part of the routine of the criminal courts. Judges, as well as administrative officers, have taken its validity for granted (People ex rel. Read v. Overseers of Poor, 23 Barb. 236; Downing v. Rugar, 21 Wend. 178; Goodman v. Alexander, 165 N. Y. 289, 291).

Not lightly vacated is the verdict of quiescent years (Ownbey v. Morgan, 256 U. S. 94, 108, 109; Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 154; Biddles, Inc. v. Enright, 239 N. Y. 354, 361).

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it" (Jackman v. Rosenbaum Co., 260 U. S. 22, 31).

This background of tradition gives the setting of the statute and the method of approach when today its validity is challenged.

Much is made of the analogy between seizure under the statute and seizure under an attachment or other provisional remedy. We agree with the appellant that the analogy is only partial and imperfect. There, the property, though taken into the custody of the law, is held until an opportunity is given to a defendant, after suitable monition, to offer his defense (Windsor v. McVeigh, 93 U. S. 274, 279; Coe v. Armour Fertilizer Works, 237 U. S. 413, 425; Grannis v. Ordean, 234 U. S. 385, 393; Pennington v. F. N. Bank, 243 U. S. 269; Security Sav. Bank v. California, 263 U. S. 282, 287). Here the officer makes return of his proceedings to the County Court which inquires into the merits, and confirms or annuls the seizure without further

warning of its action to the putative absconder (People ex rel. Read v. Downing, supra). No doubt there are times, as under the Trading with the Enemy Act (40 Stat. 411, ch. 106; 40 Stat. 1020, ch. 201, § 7-c), when a conserving custody is permissible as the result of seizure without notice (Miller v. Lautenburg, 239 N. Y. 132; Central Union Trust Co. v. Garvan, 254 U. S. 554, 568; Comm. Trust Co. of N. J. v. Miller, 262 U. S. 51). A custodian is then in [fol. 51] the position of a common-law receiver. The disposition of the property is postponed for a term prescribed by law, and thereafter rights and remedies are transferred to the proceeds as a substituted fund. This statute does something more. It seizes and then distributes at the ensuing term of court.

We think the act is valid as a regulation of the family relation binding upon residents. A system of community property exists in many States (Arnett v. Reade, 220 U. S. 311). The Legislature of New York may say, if it will, that as an incident of marriage or parenthood a like system shall apply to any property of spouse or parent acquired in the future (Seeber v. Randall, 102 Fed. Rep. 215, 217; Sandoval v. Priest, 210 Fed. Rep. 814; Nott v. Nott, 111 La Ann. 1028; Kerr v. Urie, 86 Md. 72; Long v. Hess, 154 Ill. 482; Baker's Executors v. Kilgore, 145 U. S. 487). By the statute in question, it has done something less, but something measurably akin. What is vaguely known as the police power, however indefinite its faculties, must have competence at least for this. The statute was in force long before the absconding husband made his deposit in the defendant bank, and long before his marriage. He knew, or must be assumed to have known, when he took up his abode within the State, that under the supervision of the law his property would be applied, without notice, to the discharge of his duty, the support of wife and child, if he left them destitute behind him. This was as much an incident to the family relation as dower or curtesy or any other marital right. A system of common ownership, a form of statutory assignment, was established for abandoned dependents to the extent of their necessities. Proof before the warrant with confirmatory proof thereafter, reduces to a minimum the risk of error or oppression. Whatever risk remains must be charged to the relation with

its responsibilities and duties. The law does not stand upon punctilios if there is a starving wife at home. It "does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall" (Ownbey v. Morgan, supra). It keeps its exactions within the bounds of long inherited traditions (cf. Murray's Lessee v. Hoboken L. & I. Co., 18 How. [U. S.] 272, 278). The absconder counts the cost when he selects a domicile within the State. Submission is then an incident to parenthood and marriage.

In holding that the act is valid as a regulation by the Legislature of the family relation, we assume that the owner, the victim of the seizure, is in truth a husband or a parent, his matrimonial domicile here and not abroad. Jurisdiction is, of course, dependent upon the existence of the relation which the statute seeks to regulate. In the absence of that relation, the warrant and any proceedings [fol. 52] under it may be disregarded as a nullity (Thompson v. Whitman, 18 Wall. 457). We do not read the statute as prescribing anything to the contrary. If it were open to a different reading, it would be void to that extent. The owner may come forward at any time and reclaim the fund from any one on the ground that in truth he was neither spouse nor parent, though charged as such in the petition. Neither the provisional warrant of the magistrates nor the confirmatory judgment later will then be evidence against him. Not improbably he may come forward at any time and contest the charge that he absconded, though admitting parenthood and marriage. We leave that question open. If he is within the jurisdiction, he will learn promptly of the seizure, and being present or nearby will presumably defend when defense there ought to be. If he chooses to leave the jurisdiction, the Legislature may say, in view of its control of the marital relation, that he must take the chance of an appropriation of his property for the support of his dependents (cf. Ownbey v. Morgan, supra, at p. 111). This case does not require us to hold, however, that he will even then be bound unless in truth he has absconded. Here we have neither proof nor claim that the jurisdictional relation, however broadly interpreted, was lacking at the time of seizure. Raffaele DeStefano is not

here, denying that he is an absconding husband. The bank, claiming through and under him, is not here with a denial. It admits the jurisdictional relation, for the complaint, explicit in averment upon that head, is untraversed by an answer. No doubt, the bank's admission does not bind its depositor, but its plight in that regard is no worse than that of many a stakeholder harassed by conflicting claims and forced to choose between them (Scheffer v. Erie Co. Sav. Bank, 229 N. Y. 50, 53; Newhall v. Longacre Bank, 248 N. Y. 252, 254). The statute, if valid as to spouse or parent, is valid also as to another defending in his right. The bank has the same defenses that are open to its depositor, or so we shall assume, but surely it can have no greater ones. Confronted by the claim of a statutory assignee, it must ascertain the facts and wage the contest as it can (Newhall v. Longacre Bank., supra). If it fails to learn the truth, the chance of double payment is a common risk of life (Scheffer v. Erie Co. Sav. Bank, supra).

The case in brief is this: the statute, though it dispense with notice, is valid and effective as against an absconding spouse or parent. The victim of the seizure may nullify the whole proceeding, including any adjudication attempted in his absence, if there is lacking the jurisdictional relation which is the basis of his duty. He is then in the position of a non-resident who upon a false statement of his dwelling place has been subjected to a judgment after substituted service valid only as to residents (Cont. N. Bank v. Thurber, 74 Hun. 632; 143 N. Y. 648; McDonald v. Mabee, 243 U. S. 90; cf. Miedreich v. Launestein, 232 U. S. 236), [fol. 53] or in the position of a taxpayer whose chattels have been subjected to distress upon a false averment by a taxing officer that his taxes are unpaid (Murray's Lessee v. Hoboken Land & Improvement Co., supra), or in the position of an owner whose property has been seized under a wrongful exercise by a public officer of the power to abate a nuisance (People ex rel. Copcutt v. Board of Health, 140 N. Y. 1; Lawton v. Steele, 152 U. S. 133; Samuels v. McCurdy, 267 U. S. 188, 200), or of one whose bank deposit has been paid to the holders of letters testamentary issued by a Surrogate's Court upon proof of his death, though in truth he was alive (Scott v. McNeal, 154 U. S. 34; cf. Cunnius v. Reading School District, 198 U. S. 458),

or of one injured in person or property by an administrative order (Public Clearing House v. Coyne, 194 U. S. 497). In these and like instances, the order is a nullity if there is lacking the fact upon which jurisdiction is dependent, yet valid and decisive otherwise. DeStefano will be unaffected by any adjudication made at any stage of these proceedings if the jurisdictional relation, the postulate behind the seizure, is found to be unreal. On the other hand, if the relation exists, he is not aggrieved by the seizure, nor has due process been denied him (Hatch v. Reardon, 204 U. S. 152, 160, 161; Hendrick v. State of Md., 235 U. S. 610). The bank, claiming under him, can gain no better right.

We have preferred to rest our judgment upon a ruling that, the jurisdictional relation being established or conceded, the property of an absconding spouse or parent may be applied without notice other than the seizure to the support of wife and child. We reach the same result, however, if we assume that notice is as necessary in such conditions as at the suit of any stranger. Seizure of the deposit at the instance of a public officer was warning to the owner that a proceeding had been begun (Windsor v. McVeigh, 93 U. S. 274, 279). If there was need of other warning to supply him with an opportunity for a hearing, it was given by the statute. The statute told him, a resident of the State, that the proceeding would come on for hearing at the next term of the County Court. This might be adequate notice or inadequate according to the circumstances (Roller v. Holly, 176 U. S. 398, 409; Goodrich v. Ferris, 214 U. S. 71). Under the law, the terms of County Courts are publicly appointed (Judiciary Law, § 192; Cons. Laws, ch. 30). If the term next appointed gave a reasonable opportunity to the owner to appear and defend, he is not aggrieved though in other circumstances the time might be too short. The burden is on the defendant to show that notice was inadequate.

The judgment should be affirmed with costs.

POUND, CRANE, ANDREWS, LEHMAN, KELLOGG and O'BRIEN, JJ., concur.

Judgment affirmed.

[fol. 54] IN COURT OF APPEALS OF NEW YORK

Petition for Appeal, Assignments of Error, and Prayer for Reversal

PETITION FOR APPEAL

Considering itself aggrieved by the final decision of the Court of Appeals of the State of New York, to-wit the order and judgment of said court made and entered on the 31st day of December, 1928 in a cause wherein the appellant herein was defendant and the appellee herein was plaintiff, brought in the City Court of the City of New York, County of New York, the appellant herein, The Corn Exchange Bank, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

ASSIGNMENTS OF ERROR

And the said appellant, The Corn Exchange Bank, assigns the following errors in the record and proceedings in the said cause:

(1) That the Court of Appeals of the State of New York [fol. 55] by its affirmance of the judgment of the City Court of the City of New York entered pursuant to an order of reversal of the Appellate Term of the Supreme Court of the State of New York, First Department, which said judgment denied the appellant's motion to dismiss the complaint and granted judgment for the appellee, erred in that it did not dismiss the complaint on the ground that said complaint fails to state facts sufficient to constitute a cause of action by reason of the fact that any right of action therein is based upon Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, referred to in the complaint, and that said sections are unconstitutional under the Constitution of the State of New York, and particularly the 14th amendment thereto, in that said sections by their terms, and as construed by the Court of Appeals, attempt to deprive persons, including the appellant, The Corn Exchange Bank, and its depositor, Raffaele De Stefano, men-

tioned in said complaint, and either or both of them, of property without due process of law.

(2) That the said Court of Appeals further erred in said affirmance of the denial of the appellant's motion, as aforesaid, in that it did not dismiss the complaint on the ground that the plaintiff in said action, the appellee herein, has no legal capacity to sue and has no title or interest in the fund referred to in the complaint, and the court in which said action was instituted has no jurisdiction of the subject of the action, because the plaintiff, the appellee herein, derived whatever capacity or interest he has or had from Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, which said sections, as heretofore stated, are unconstitutional and in violation of the 14th amendment of the Constitution of the United States, in that said sections attemps to deprive said appellant, The Corn [fol. 56] Exchange Bank, and its depositor, Raffaele de Stefano, and either or both of them, of property without due process of law.

PRAYER FOR REVERSAL.

For which errors the appellant, The Corn Exchange Bank, prays that said order and judgment of the Court of Appeals of the State of New York, dated the 31st day of December, 1928, in the above entitled case be reversed, and a judgment rendered in favor of said appellant, The Corn Exchange Bank, and for costs.

Dated January 18, 1929.

Spotswood D. Bowers, Counsel for Appellant.

[fol. 57] IN COURT OF APPEALS OF NEW YORK

ORDER ALLOWING APPEAL

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the order and judgment made and entered in the above entitled cause by the Court

of Appeals of the State of New York on the 31st day of December, 1928, and from each and every part thereof, and having presented and filed its petition for appeal, assignments of errors and prayer for reversal, pursuant to the statutes, and rules of the Supreme Court of the United States in such cases provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Appeals of the State of New York in the above entitled cause, as provided by law, and

It is further ordered that the Clerk of the City Court of the City of New York, County of New York, in the State of New York, shall prepare and certify a transcript of the record, proceedings and judgment in this case, and transmit same to the Supreme Court of the United States so that it shall have the same in said court within thirty (30) days [fols. 58 & 58½] of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated January 18, 1929.

Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York.

[fols. 59-67½] Bond on Appeal for $3,211.50 omitted in printing.

[fol. 68] In City Court of City of New York

[Title omitted]

Order on Remittitur—Jan. 14, 1929

The defendant in the above entitled action having appealed to the Court of Appeals from the judgment in the above-entitled action, in favor of the plaintiff and against the defendant, entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3d day of October, 1928, for the sum of $2,211.50, and also from an order in the above-entitled action made on the 3rd

day of August, 1928, and entered in the office of the Clerk of the City of Court of the City of New York, New York County, on the 3d day of August, 1928, making the order and judgment of the Appellate Term, First Department, the order and judgment of the City Court of the City of New York, New York County, which order of said Appellate Term, First Department, reversed the judgment dismissing the complaint herein, and directed judgment in favor of the plaintiff for the sum demanded in the complaint; and the said appeal having been duly argued at the said Court of Appeals, and the Court, in an order made and [fol. 69] entered therein the 31st day of December, 1928, ordered and adjudged that the judgment of the City Court of the City of New York appealed from herein be affirmed with costs, and having further ordered that the record therein and the proceedings in said Court be remitted to the said City Court of the City of New York, there to be proceeded upon according to law;

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff-respondent, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

H. L. S., J. C. C.

[fol. 70] In City Court of City of New York

Bird S. Coler, Commissioner of Public Welfare of the City of New York, Plaintiff-Respondent,

against

The Corn Exchange Bank, Defendant-Appellant

Judgment

The defendant in the above-entitled action having appealed to the Court of Appeals from the judgment in the above-entitled action, in favor of the plaintiff and against the defendant, entered in the office of the Clerk of the City Court of the City of New York, New York County, on the

3d day of October, 1928, for the sum of $2,211.50, and also from an order in the above-entitled action made on the 3rd day of August, 1928, and entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3rd day of August, 1928, making the order and judgment of the Appellate Term, First Department, the order and judgment of the City Court of the City of New York, New York County, which order of said Appellate Term, First Department, reversed the judgment, dismissing the complaint herein, and directed judgment in favor of the plaintiff for the sum demanded in the complaint; and the said appeal having been duly argued at the said Court of Appeals, and that Court in an order made and entered [fol. 71] therein the 31st day of December, 1928, ordered and adjudged that the judgment of the City Court of the City of New York appealed from herein be affirmed with costs, and an order having been duly entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 14th day of January, 1929 making the order and judgment of the Court of Appeals the order and judgment of this court, and the costs of the plaintiff-respondent having been duly taxed at the sum of $170.66.

Now on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff-respondent, it is

Adjudged that the judgment of the City Court of the City of New York, New York County, appealed from herein be and the same hereby is affirmed, and it is further

Adjudged that the plaintiff-respondent Bird S. Coler, Commissioner of Public Welfare of the City of New York, recover of the defendant-appellant The Corn Exchange Bank, the sum of $170.66 the amount of said plaintiff-respondent's costs as taxed and that said plaintiff-respondent have execution therefor.

Dated New York, January 22, 1929.

Harry C. Perry, Clerk.

[fol. 72] IN COURT OF APPEALS OF NEW YORK

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys and counsel for the respective parties in the above-entitled cause that the printed record on appeal in the Court of Appeals of the State of New York, entitled "Papers on Appeal from Judgment and Order of the City Court of the City of New York, County of New York" and "Supplement to Papers on Appeal from Judgment and order of the City Court of the City of New York, County of New York"; the order of remittitur of the Court of Appeals of the State of New York dated December 31, 1928, attached to said record, and certificate of the Clerk of the Court of Appeals of the State of New York, attached thereto; the opinion of the Court of Appeals of the State of New York; the petition for appeal, assignments of error and prayer for reversal to the Supreme Court of the United States; the order allowing appeal to the Supreme Court of the United States; supersedeas bond, security for cost and [fol. 73] stay of execution; the order staying execution of judgment and the original citation and proof of service thereof, and the order of the City Court of the City of New York, New York County, dated January 14, 1929 and the judgment of the City Court of the City of New York, New York County, dated January 22, 1929, constitute all the record to be certified by the Clerk of the City Court of the City of New York and transmitted to the Supreme Court of the United States, and constitute all the papers necessary for consideration of the appeal herein.

Dated February 6, 1929.

Spotswood D. Bowers, Counsel for the Corn Exchange Bank, Appellant. George P. Nicholson, Counsel for Bird S. Coler, Commissioner of Public Welfare of the City of New York, Appellee.

[fols. 74-77½] Citation, in usual form, showing service on George P. Nicholson et al., omitted in printing.

[fols. 78-80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Feb. 16, 1929

Comes now the appellant in the above-entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. The Court of Appeals of the State of New York erred in holding that Sections 921, 922, 923, 924, and 925 of the Code of Criminal Procedure of the State of New York, upon which sections alone the plaintiff's (appellee here) cause of action is concededly predicated, are not unconstitutional and not in violation of the 14th Amendment to the Constitution of the United Etates, and that said sections do not deprive or attempt to deprive appellant and its depositor, Raffaele De Stefano, either or both of them of property without due process of law, for the following reasons:

(a) Sections 921, 922, 923, 924 and 925 of the Code of Criminal Procedure of the State of New York do, by their express terms, and as construed by the Court of Appeals [fol. 82] deprive or attempt to deprive persons including the appellant and its depositor, Raffaele De Stefano, and either or both of them of property without due process of law; and

(b) Said sections of the Code of Criminal Procedure in violation of due process of law do attempt to authorize the seizure and administration and a divesting of title to property of appellant and its depositor, Raffaele De Stefano, without any notice to appellant or its depositor, Raffaele De Stefano, and without opportunity on the part of appellant or its depositor, Raffaele De Stefano, to be heard, and in that thereby appellant and its depositor, Raffaele De Stefano, and either or both of them, are deprived of their property and their property rights are thereby impaired without due process of law; and

(c) That appellant has a sufficient interest in the fund in question and has sufficient property rights therein to urge to this court the unconstitutionality of said sections as they affect the appellant and its depositor, Raffaele De Stefano.

And the Appellant further states that the parts of the record as filed in this court, which need to be printed by the Clerk for the hearing of the case, are the entire record, as so filed and numbered pages 1 to 80, with the exception of pages 65, 66 and 67 of said numbered pages which are entitled "Order Staying Execution of Judgment."

Spotswood D. Bowers, Counsel for Appellant.

[fol. 83] Supreme Court of the United States

Sir: Please take notice that the within is a true copy of the Appellant's Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed in the above-entitled cause.

Dated New York, February 7, 1929.

Yours, &c., Spotswood D. Bowers, Counsel for Appellant, 57 Williams Street, Borough of Manhattan, New York City.

To George P. Nicholson and J. Joseph Lilly, Esqs., Counsel for the Appellee, Municipal Building, Borough of Manhattan, New York City.

[fol. 84] Supreme Court of the United States.

United States of America,
Southern District of New York,
State of New York,
County of New York, ss:

James F. Twohy, being duly sworn, deposes and says that he is over the age of twenty-one (21) years and is an attorney and counselor at law, associated with Spotswood D. Bowers, counsel for the appellant in the above-entitled pro-

ceeding. That on the 14th day of February, 1929, between the hours of four o'clock P. M. and five o'clock P. M. he served the annexed statement of points and designation of the parts of the record to be printed on George P. Nicholson, Corporation Counsel of the City of New York, and counsel and attorney for Bird S. Coler, Commissioner of Public Welfare of the City of New York, appellee in the above-entitled cause, by delivering to and leaving with a [fol. 85] person of suitable age and discretion in charge of the office of said George P. Nicholson, to wit: the Chief Clerk thereof, in the Municipal Building, Borough of Manhattan, City, County and State of New York, a true and correct copy of the said statement of points and designation, the said George P. Nicholson being absent from his office at the time of such service; at the time of said service deponent received from the person to whom he delivered the copy of the annexed statement of points and designation, an admission of the service thereof upon the said George P. Nicholson, which said admission of service appears upon the back of the annexed statement of points and designation.

That on the 14th day of February, 1929, between the hours of four o'clock P. M. and five o'clock P. M. the deponent also served the annexed statement of points and designation upon J. Joseph Lilly, Assistant Corporation Counsel of the City of New York, and also counsel and attorney for Bird S. Coler, Commissioner of Public Welfare of the City of New York, appellee in the above-entitled action, by delivering to and leaving with a person of suitable age and discreition in charge of the office of said J. Joseph Lilly, Assistant Corporation Counsel of the City of New York, to wit: the Chief Clerk thereof, in the Municipal Building, Borough of Manhattan, City, County and State of New York, a true and correct copy of the said statement of points and designation, the said J. Joseph Lilly being absent from his office at the time of such service; at the time of said service deponent received from the person to whom he delivered the copy of the annexed statment of points and designation an admission of the [fols. 86 & 86½] service thereof upon the said J. Joseph

Lilly, which said admission of service appears upon the back of the annexed statement of points and designation.

James F. Twohy.

Sworn to before me this 15th day of February, 1929. Henry M. Carpenter, Notary Public. Queens Co. Cl'k's No. 270. Queens Register No. 460. N. Y. Co. Cl'k's No. 176. N. Y. Reg. No. O-162. Commission expires March 30, 1930. (Seal.)

[File endorsement omitted.]

Endorsed on cover: File No. 33,996. New York Court of Appeals. Term No. 687. The Corn Exchange Bank, appellant, vs. Bird S. Coler, Commissioner of Public Welfare of the City of New York. Filed February 9th, 1929. File No. 33,996.

FILE COPY

FILED
FEB 26
CHARLES ELMORE

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. [redacted] 36

THE CORN EXCHANGE BANK,

Appellant,

v.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

SPOTSWOOD D. BOWERS,
Counsel for Appellant,
No. 57 William Street,
New York City.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

Supreme Court of the United States.

OCTOBER TERM, 1928. No. 687.

THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

May it Please the Court:

The appellant in support of the jurisdiction of this Court to review the above-entitled cause on appeal respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, §344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

"APPELLATE JURISDICTION OF DECREES OF STATE COURTS; CERTIORARI. (a) A final judgment or

decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. (United States Code, Title 28, §861a), provides as follows:

"WRIT OF ERROR ABOLISHED; SUBSTITUTION OF APPEAL. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of January 31, 1928, Chapter 14, Section 2, 45 Stat., as amended by the Act of April 26, 1928, Chapter 440, 45 Stat. (United States Code, Title 28, §861b), provides as follows:

"STATUTES GOVERNING WRITS OF ERROR TO APPLY TO APPEALS. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of

exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Decree and of Application for Appeal.

The judgment and order sought to be reviewed was made and entered in the office of the Clerk of the Court of Appeals of the State of New York on the 31st day of December, 1928 (Certified Transcript of Record, pp. 1 to 3 inclusive). The petition for appeal, assignments of error and prayer for reversal were presented to the Chief Judge of the Court of Appeals of the State of New York on the 18th day of January, 1929, and the order allowing said appeal was duly signed by the Chief Judge of the Court of Appeals of the State of New York on the 18th day of January, 1929 (Certified Transcript of Record, pp. 54 to 58 inclusive).

C.

Nature of Case and Rulings Below.

The appellee, Commissioner of Welfare of the City of New York, purporting to act pursuant to Sections 921 to 925 of the Code of Criminal Procedure of the State of New York, made an *ex parte* application to and obtained from two city magistrates of the City of New York a warrant of seizure directing the appellee, as such Commissioner, to take and seize all of the right, title

and interest of one Raffaele de Stefano in and to a deposit made by de Stefano with the appellant, a banking corporation organized under the laws of the State of New York, and thereafter to make an inventory and return, alleging in said application that said Raffaele de Stefano was the husband of one Mary de Stefano and the father of an infant child of said marriage and had abandoned said wife and child leaving them in danger of becoming charges upon the public, and absconding from the State of New York (Complaint and Warrant, Certified Transcript of Record, pp. 18 to 21 and Affidavits, pp. 27 to 31).

Upon the refusal of appellant to recognize the said warrant the appellee thereafter brought an action in the City Court of the City of New York, New York County, setting forth the foregoing and demanding judgment against the defendant for the sum of $2,030, the amount of the said deposit (Complaint, Transcript of Record, p. 19).

Thereupon the appellant, pursuant to the rules and statutes of the State of New York, and without pleading to the complaint, moved to dismiss the complaint upon the ground, among others, that the complaint failed to state facts sufficient to constitute a cause of action and that the plaintiff had no legal capacity to sue, in that Sections 921 and 922 of the Code of Criminal Procedure referred to in the complaint are unconstitutional under the Constitution of the United States and particularly the Fourteenth Amendment thereto in that said sections attempt to deprive persons, including the defendant, and its depositor Raffaele de Stefano of property without due process of law and, in that it appears that no process of any kind in the proceedings upon which the warrant was based were ever served upon Raffaele de Stefano or this

appellant (Notice of Motion, Transcript of Record, pp. 22-24).

Sections 921, 922 and 923 of the Code of Criminal Procedure of the State of New York are set forth in the opinion of the Appellate Term found in the Transcript of Record herein at pages 41 and 42 and in substance said sections provide that upon application of the officers therein named to two police justices, upon proof that a husband or father absconds from his wife or children leaving them likely to become charges upon the public, said two magistrates may issue a warrant authorizing said officer so applying to take and seize the property of the person so absconding and that such officer is thereupon vested with title to the property of the person proceeded against, and upon return of the warrant after seizure to the County Court of the county where such persons reside, that such Court, upon inquiring of the circumstances of the case, may confirm or discharge the warrant or seizure; and if confirmed may direct such property to be applied to the maintenance of the children or spouse of the person absconding.

It will be noted that no provision is anywhere made for any notice, either constructively or otherwise, of any kind whatsoever, either before or after seizure, to the alleged absconding father or spouse or to anyone else.

The appellant's motion heretofore referred to was granted by the City Court of the City of New York (Transcript of Record, p. 14) and judgment was duly entered dismissing the complaint with costs (Transcript of Record, pp. 15, 16).

Upon appeal to the Appellate Term of the Supreme Court of the State of New York, First Department, the judgment of the City Court and the order upon which

it was based were reversed and judgment directed in favor of the appellee and against the appellant for the amount demanded in the complaint (Transcript of Record, p. 35). An opinion was written by the Appellate Term which is found at pages 40 to 46 of the Transcript of Record, holding the said statute constitutional under the United States Constitution. Pursuant to practice in such case made and provided an order was entered in the City Court of the City of New York making the order and judgment of the Appellate Term the order and judgment of the City Court of the City of New York, and a judgment was entered thereon in the City Court of the City of New York (Transcript of Record, pp. 8 to 10). Pursuant to the Constitution of the State of New York and the statutes of the State of New York an appeal was taken by the appellant directly to the Court of Appeals of the State of New York from the order and judgment of the City Court entered upon the mandate of the Appellate Term, as aforesaid; such appeal being permissible upon the ground that the only question involved in the appeal was the validity of a statutory provision of the state under the Constitution of the State and of the *United States* (Transcript of Record, Notice of Appeal, pp. 6, 7; Opinion of the Court of Appeals, p. 48).

Said appeal having duly come up for hearing and the Court of Appeals having after deliberation considered said appeal upon the merits, upon the 31st day of December, 1928, it ordered and adjudged that the judgment of the City Court of the City of New York appealed from should be and the same thereby was affirmed with costs (Transcript of Record, pp. 1 to 3).

It further appears affirmatively from the opinion of the Court of Appeals that the constitutionality of the sections of the Code of Criminal Procedure referred to in the complaint under the Constitution of the United States and particularly the Fourteenth Amendment thereto, was not only directly raised by the appellant's motion but that that was the only point considered by the Court of Appeals, with the exception of the constitutionality of the said statutes under similar provisions of the Constitution of the State of New York; and it also affirmatively appears from said opinion that that constitutional question was specifically considered and determined by the Court of Appeals; said opinion stating as follows:

> "The defendant has moved for judgment upon the ground that the statute, the basis of the warrant, is a denial of 'due process' under the Constitution of the State *and Nation* (N. Y. Constitution, Article I, §6; *U. S. Constitution; Amendment XIV*). * * * The appeal taken directly from that judgment is within the jurisdiction of this Court, a constitutional question, and no other being involved therein." (Italics ours.)

and proceeded to hold that said statute was not unconstitutional under the Fourteenth Amendment to the Constitution of the United States and affirmed the judgment directed against the appellant (Transcript of Record, Opinion of Court of Appeals, pp. 48 to 53 inclusive).

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Weller v. *New York,* 268 U. S. 319;
Ribnik v. *McBride,* U. S. Sup. Ct. Advance Sheets No. 3, Volume 277, page 350;
Wuchter v. *Pizzutti,* U. S. Sup. Ct. Advance Sheets No. 1, Volume 276, page 13;
Cohens v. *Virginia,* 19 U. S. (Wheaton) 264;
Fiske v. *Kansas,* 274 U. S. 380;
Pierce v. *Society of Sisters,* 268 U. S. 510.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the statutes referred to in Point "A" hereof in that this is an appeal from the final judgment or decree in a suit in the highest court of the State of New York in which a decision in this suit can be had and that there was drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity.

Respectfully submitted,

SPOTSWOOD D. BOWERS,
Counsel for Appellant.

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CHARLES ELMO

Supreme Court of the United States.

OCTOBER TERM 1929, NO. 36.

(October Term 1928, No. 687.)

THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

BRIEF OF APPELLANT.

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Supreme Court of the United States.

OCTOBER TERM, 1929, NO. 36.

(October Term, 1928, No. 687.)

THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

BRIEF OF APPELLANT.

I.

The opinions of the Courts below.

The opinion of the Court of Appeals of the State of New York is reported in *Coler* v. *Corn Exchange Bank*, 250 N. Y. 136 (and is printed at p. 47 of the Transcript of Record), and the opinions and the dissenting opinion of the intermediate Court, to wit, the Appellate Term of the Supreme Court of the State of New York, are reported in *Coler* v. *Corn Exchange Bank*, 132 Misc. Rep. (N. Y.) 449 (and are printed at pp. 39 and 45 of the Transcript).

II.

Jurisdiction.

Appellant has complied with paragraph 1 of Rule 12 of the Rules of the Supreme Court by filing a printed statement as to the jurisdiction on appeal, and this Court has announced the finding "that probable jurisdiction has been shown".

III.

Statement of the case.

This is an appeal to this Court from an order and judgment made and entered in this cause by the Court of Appeals of the State of New York on the 31st day of December, 1928 (R., p. 56), which judgment affirmed a judgment of the City Court of the City of New York, New York County (R., p. 1). The said judgment of the City Court was entered pursuant to an order of the Appellate Term of the Supreme Court of the State of New York (an intermediate court of appeal) (R., pp. 6 to 8 inclusive), which said order of the Appellate Term of the Supreme Court reversed a prior judgment of the City Court dismissing the complaint and directed judgment in favor of the plaintiff for the amount claimed (R., p. 33). The original judgment of the City Court dismissing the complaint (R., p. 13) was entered upon motion of the appellant, notice of motion therefor being found at page 20 of the record (R., p. 20).

The action was brought in the City Court of the City of New York, New York County, a court of original

jurisdiction, by the plaintiff, the appellee here, in his capacity as Commissioner of Public Welfare of the City of New York under Sections 921-925 of the Code of Criminal Procedure of the State of New York. Title VIII, entitled "Of Proceeding respecting the Support of Poor Persons" (see Complaint, R., pp. 16-17). Title VIII forms part of Part VI of the Code of Criminal Procedure of the State of New York and Part VI is entitled "Of Special Proceedings of a Criminal Nature". These sections are set forth in full in Appendix A of this brief at pages 49-52 thereof.

The complaint alleges the deposit by one De Stefano with appellant bank; that De Stefano was the husband of one Mary De Stefano; that there is an infant child, the issue of said marriage; that De Stefano abandoned his said wife and child and absconded from the State of New York (R., p. 16). The complaint further alleges the obtaining of a warrant of two City Magistrates under sections of the Code of Criminal Procedure above referred to "directing the said Bird S. Coler, Commissioner of Public Welfare of the City of New York, to take and seize all the right, title and interest of the said Raffaele De Stefano in and to the sum of Two thousand and thirty ($2,030) Dollars which is now in the possession of the defendant", and to make return to the Court of General Sessions of the County of New York (R., pp. 16, 17). The complaint then alleges the service of said warrant upon the appellant and the refusal of the appellant to deliver to the Commissioner of Public Welfare the sum of money referred to in said warrant. The complaint then asks judgment for said amount against the appellant (R., p. 17). *The complaint nowhere alleges any notice of the proceeding had been given to said de-*

positor and it is not even alleged that the matrimonial domicile is in the State of New York (R., pp. 41-45).

The appellant, under the New York practice, without answering the complaint and before its time to answer had expired, made a motion to dismiss the complaint upon various grounds, principally upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, in that the sections of the Code of Criminal Procedure under which the Commissioner of Public Welfare sought to act were unconstitutional under the Constitution of the United States, particularly the Fourteenth Amendment thereto, in that they attempted to deprive persons, including the appellant and its depositor, De Stefano, of property without due process of law (R., pp. 20, 21). The practice herein referred to is substantially the same as what is generally known as a demurrer, demurrers as such having been abolished in the State of New York and motions, such as appellant made, having been substituted therefor with like effect. The judgment appealed from is therefore similar to the overruling of a demurrer and to the entering of judgment forthwith without leave to answer. Consequently there has been no trial of any issues of fact.

(It may be confusing to this Court to note that from pages 9 to 33 inclusive of the record is entitled "Remittitur from Appellate Term to the City Court of the City of New York". This is due to a rather peculiar statutory and constitutional provision of the State of New York which permits an appeal from the judgment of the City Court entered upon the remittitur of the Appellate Term direct to the Court of Appeals of the State of New York, rather than from the order and judgment of the Appellate Term of the Supreme Court of the State of New York itself.)

IV.

Specifications of error.

(1) The Court of Appeals of the State of New York by its affirmance of the judgment of the City Court of the City of New York entered pursuant to an order of reversal of the Appellate Term of the Supreme Court of the State of New York, First Department, which said judgment denied the appellant's motion to dismiss the complaint and granted judgment for the appellee, erred in holding that Sections 921-922 of the Code of Criminal Procedure of the State of New York were not violative of the provisions of the Constitution of the United States, particularly the Fourteenth Amendment thereto, and said Court further erred in that it did not dismiss the complaint on the ground that said complaint fails to state facts sufficient to constitute a cause of action by reason of the fact that any right of action is based upon Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, referred to in the complaint, and that said sections are unconstitutional under the Constitution of the United States, and particularly the Fourteenth Amendment thereto, in that said sections by their terms, and as construed by the Court of Appeals, attempt to deprive persons, including the appellant, The Corn Exchange Bank, and its depositor, Raffaele De Stefano, mentioned in said complaint, and either or both of them, of property without due process of law.

(2) The said Court of Appeals further erred in said affirmance of the denial of the appellant's motion, as aforesaid, in that it did not dismiss the complaint on the

ground that the plaintiff in said action, the appellee herein, has no legal capacity to sue and has no title or interest in the fund referred to in the complaint, and the court in which said action was instituted has no jurisdiction of the subject of the action, because the plaintiff, the appellee herein, derived whatever capacity or interest he has or had from Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, which said sections, as heretofore stated, are unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States, in that said sections attempt to deprive said appellant, The Corn Exchange Bank, and its depositor, Raffaele De Stefano, and either or both of them, of property without due process of law.

V.

Argument.

As set forth in our statement of facts, Sections 921-925 of the Code of Criminal Procedure form part of Title VIII of that Code, and Title VIII forms part of Part VI of said Code, Part VI being entitled "Of Special Proceedings of a Criminal Nature", and are set forth in Appendix A annexed to this brief, at pages 49-52 thereof.

It will readily be noted that *the Legislature in enacting these statutes utterly neglected to provide therein for notice of any kind, either in the Magistrate's Court or at any later stage of the proceedings, to be given to the alleged absconded husband, the appellant's depositor.* The entire proceeding from its inception to its conclusion, is *wholly ex parte,* and this, though the statute provides not merely for the seizure of property, but for the vest-

ing of title thereto in a third party, as completely and fully as if the owner of the fund had made a legal and voluntary transfer of the fund and all his interest therein.

The question involved on this appeal is whether said statute is constitutional, which requires a bank to pay money it owes a depositor to the Commissioner of Public Welfare, by reason of the statute which purports to create an assignment of the fund, although the statute provides for *no notice whatever either to the depositor or to the bank.*

The Court of Appeals, in affirming the constitutionality of the statute, unblushingly recognizes that by reason of the lack of notice the depositor may at any time attack the *ex parte* proceeding which established the assignment (R., pp. 52-53), and so it is evident that upon showing that he was not an absconding husband or father or one whose matrimonial domicile was not in the State of New York, or that his wife and child were not likely to become public charges, could recover from the bank the amount of the deposit, even though the bank has complied with the order of the Magistrate's Court and paid same over to the Commissioner of Public Welfare.

Thus the appellant bank, under the statute in question and under the decision of the Court of Appeals of New York State, may have to pay a debt twice, although throughout it has been an entirely innocent party in the matter.

This incongruous result is possible under the statute in question, which provides that when a complaint is made by the Commissioner of Public Welfare, that a husband has absconded and left his wife and child unprovided for, on an *ex parte* proceeding instigated for

such purpose and *without any notice whatsoever to the alleged absconder,* and upon *ex parte* proof of such facts having been made, the Magistrates of the Court are required to issue an order directing the Commissioner of Public Welfare to take and seize property of the alleged absconder and make an inventory thereof and return same to the next County Court of the county where the seizing officers reside.

As stated, *the statute requires no notice whatsoever, either by publication or otherwise, to be given to the alleged absconding husband and father* either before issuance of the process directing the bank to turn over the money on deposit to the Commissioner of Public Welfare, or even thereafter when the Court confirms or discharges the warrant and seizure and determines what part of the property shall be applied towards the maintenance of the children or spouse of the alleged absconder.

Thus, on an *ex parte* application to which neither the bank nor the alleged absconding husband is a party, and to neither of whom notice is given, an order finding the statutory facts may be made and the bank, under the decision of the Court of Appeals, is compelled to make the payment, even though it may subsequently have to pay a second time if it should develop that the husband had not in fact absconded or that the dependents of the absconder were not chargeable or likely to become chargeable upon the public. The theory of the law as construed by the Court of Appeals is that there is a statutory assignment of the fund to the Commissioner of Public Welfare (see R., p. 51).

It is the contention of the appellant that before it can be compelled to pay to one person a debt it owes to another person, on the theory of statutory assignment, there must first be a determination by a judicial proceeding, upon notice to the debtor of the bank, that the

facts on which such assignment depend actually exist and that the money is due such other person, in which case the bank can safely make the payment without any danger of any comeback from the person to whom the payment is directed to be made. But this was not done in the case at bar and is not even contemplated, much less provided, in the statute in question.

As we will show hereafter, the law is well settled that a statute taking an owner's property is unconstitutional which fails to provide for notice to the party whose property is to be taken. This is so, even though in fact the person might have notice of the proceeding (see cases *infra,* Point C). The appellant's position is that before it can be compelled to pay to one person money it owes to another person the constitutional requirements must be complied with, and that the party must show that the statute requires notice, and that notice was in fact given.

The theory on which the Court of Appeals has proceeded is that the bank, which is manifestly in no position to ascertain the facts, and which has been given no notice of the *ex parte* hearing, cannot object to payment but must at its peril be prepared to set up a defense that the depositor was not in fact an absconding husband, or else it is bound by the *ex parte* findings.

That the Court of Appeals recognizes that the *ex parte* proceeding is not binding upon the alleged absconding husband, and that the bank may have to make payment twice, is clearly shown by the following extracts from the opinion:

> "In holding that the act is valid as a regulation by the Legislature of the family relation, *we assume that the owner,* the victim of the seizure,

is in truth a husband or a parent, his matrimonial domicile here and not abroad. Jurisdiction is, of course, dependent upon the existence of the relation which the statute seeks to regulate. In the absence of that relation, the warrant and any proceedings under it may be disregarded, as a nullity (*Thompson* v. *Whitman*, 18 Wall. 457). We do not read the statute as prescribing anything to the contrary. If it were open to a different reading, it would be void to that extent. *The owner may come forward at any time and reclaim the fund from any one on the ground that in truth he was neither spouse nor parent, though charged as such in the petition.* Neither the provisional warrant of the magistrates nor the confirmatory judgment later will then be evidence against him. *Not improbably he may come forward at any time and contest the charge that he absconded,* though admitting parenthood and marriage. * * * *This case does not require us to hold, however, that he will even then be bound unless in truth he has absconded.* * * *

The case in brief is this: the statute, though it dispenses with notice, is valid and effective as against an absconding spouse or parent. *The victim of the seizure may nullify the whole proceeding, including any adjudication attempted in his absence, if there is lacking the jurisdictional relation which is the basis of his duty."*

It is indeed a strange anomaly that a proceeding against an alleged absconder's debtor should bind the debtor but not the absconder. That the statute does in fact do what we claim it does is conceded by the Court of Appeals, and that Court concedes that no notice is provided for at any stage of the proceedings (R., p. 54),

unless the mere seizure itself constitutes notice, which we will hereinafter show has been repudiated by this Court in the very case cited as an authority therefor by the Court of Appeals.

We need not therefore argue the construction of the statute as the highest court of the State has agreed with us in that respect.

Throughout the opinion the Court of Appeals considers the question solely and only from the standpoint of the alleged absconder, and *entirely overlooks the fact that what is seized is the property of the appellant bank and not of the absconder.* It is true that the bank owes a debt to the depositor, but that fact does not any the less make the seizure a seizure of the property of the bank, and the bank is entitled to have its property protected from seizure even though it owes a debt to another person, except in a case where legal title to the debt has been transferred to another by such a legal act, as cannot be attacked by the depositor.

To justify the seizure, therefore, upon the theory of statutory assignment, the complaint is not sufficient in that it does not allege all the facts necessary to show unquestioned title in the Commissioner of Public Welfare, for this it fails to do when the statute under which the proceeding is authorized admittedly provides for no notice to either the debtor or even the appellant bank, and no notice is alleged in the complaint. Moreover, the Court of Appeals itself admits repeatedly in its opinion that the depositor is not bound by the judgment because of the lack of notice.

The theory of the Court of Appeals is that the appellate bank is defending in the right of the depositor, and that it can have no defenses which are not open to its depositor, and that the depositor would be bound even

though he had no notice, unless he was able to show that he was not an absconding husband, and consequently the appellant bank must at its peril assume the burden of proving that the depositor had not absconded in order to avoid making payment to the Commissioner of Public Welfare.

That is just where the error comes in as we understand it, for *the appellant bank is not defending in the right of its depositor. It is defending its own property in its own right*, and it claims that it may not be compelled to pay a debt, due to its depositor, to another person on the theory that that other person has a statutory assignment thereof, unless and until that person alleges facts which conclusively show such statutory assignment and that that is not done in the case at bar where admittedly the person whose property is claimed to have been assigned has had no notice of the proceeding which it is claimed created the assignment, and so concededly might successfully attack same.

To sustain the constitutionality of the statute in question will open the door to the grossest sort of fraud. No bank will be safe. Any irate or misinformed wife or child may have a husband's or father's bank account seized when he may be sojourning at a distance, and then have the money used for their support, and upon the husband's or father's returning after a long period of time and finding out about the matter, and showing that he did not abscond or that he was not in fact the husband or father as alleged, or that the matrimonial domicile was not in New York State, the bank will have to pay him and will of course be unable to recover from the wife or child for whose support the money has been used.

The question is a real one, and of the utmost import-

ance to banks, and is in no sense a mere techincal question.

The Court of Appeals seems to have been actuated to some extent in deciding as it did by the theory that the law is a very old one and has apparently never been questioned. In this respect we respectfully call attention to the fact that until 1829 (see Opinion, Court of Appeals, R., pp. 49-50), the law admittedly did not cover choses in action such as a debt. Moreover the Fourteenth Amendment to the United States Constitution, under which the appellant bank claims, was not enacted until 1866. Its antiquity is, therefore, nothing like what the Court of Appeals claims for it. The statute has apparently not been resorted to until lately to any extent. The antiquity of the statute is of no importance except in case of ambiguity, when it may be considered in determining the proper construction of the statute. Where the language of the statute is clear and precise, and the meaning evident, the statute will be declared unconstitutional no matter how long it has been in existence.

In an endeavor to uphold its contention the Court of Appeals tries to work out a theory of notice by claiming that the statute creates a sort of community property imposed by the marriage relationship of which every married person has notice, and that this complies with the constitutional requirement. But it must be borne in mind that even admitting all the allegations in the complaint, it has nowhere been shown that the marriage contract was entered into in the State of New York, or that a matrimonial domicile was ever validly established in the State of New York, or that the alleged husband did not in fact adequately provide for his alleged wife, because no such allegations are contained in the complaint. And except for the technical admission by appel-

lant's motion of the allegations contained in the complaint, it has nowhere been shown that the alleged husband ever was in fact a husband, or that he ever absconded from the State of New York.

But if the Court of Appeals considers this relationship notice then why should the Court of Appeals admit as it does throughout its opinion that the proceeding can be attacked by the alleged absconder. *If he had notice he would have had his day in court and would not be heard afterwards to allege any defense which he failed to allege at that time. It is apparent, therefore, that the court really recognizes that there is no really sufficient notice provided for.* Otherwise it would not be consistent to admit that the judgment of seizure could ever be attacked by the alleged absconding husband.

We also call special attention to the fact that the statement made in the opinion of the Court of Appeals that "here we have neither proof nor claim that the jurisdictional relation * * * was lacking at the time of seizure" (R., p. 52) is erroneous. We do claim, and at all times have claimed, that the jurisdictional elements were lacking and could not be shown without giving to the depositor notice and an opportunity to be heard thereon at some stage of the proceeding at least. A clear distinction of course must be made between statements of fact in the complaint and the statements of what was shown by proof in the proceeding in the Magistrate's Court, as alleged in paragraph numbered "Fifth" of the complaint (R., pp. 16, 17). An admission that certain facts were duly (according to the requirements of the statute in question) proved in the *ex parte* proceeding in that court does not of course admit the facts themselves.

The Court of Appeals in comparing this statute as

stated above to that of a statute creating community property of a husband and wife, which is the law of some states having as a basis the Civil Law, but which is not the law of the State of New York, entirely overlooks the theory that such a property right as community property of husband and wife is vastly different to that intended to be conferred by this statute. The theory of the community property is that the contract of marriage itself establishes a partnership ownership of the property of each, acquired after marriage, in the husband and wife jointly as part of the community (C. J., Vol. 31, p. 18, Sec. 1089), in somewhat the same way that at common law the wife's personal property becomes vested in the husband. But the statute in question in the case at bar does not create or intend a *vesting* of property in one spouse at the inception of the marriage contract, but rather seeks to enforce a contract right or duty of a husband to support his wife. That is not a property right. It is a contract right or duty. It is a personal right of the wife against the husband, not a property right of herself or a partnership of property, which formerly belonged to him. Without the aid of the statutory proceeding in question could she bring an action for conversion of her alleged husband's property? Could she convey it to another? Would an indictment be good which alleged a theft from her? Clearly not. It is not her property, and does not become so until confiscated by the State and conveyed by the State to her. But may the State do this without due process of law? That is the question here presented.

The true analogy is, therefore, not that of community property but that of matrimonial actions, and ample protection is afforded to wives and minor children in New York, as in all states, by different forms of matrimonial

actions. The same situation which this statute seeks to take cognizance of is a proper subject for a matrimonial action. If a husband does not support his wife or absconds from her, she may sue him for separation and attach his property for that purpose, but such an action differs in no respect from any other action, in which jurisdiction is conferred by some form of reasonable notice and an opportunity to be heard.

We feel that the Court of Appeals was influenced through a misplaced sympathy for a wife alleged to be starving. If a wife is in fact starving, if her alleged husband is in fact a husband, if he is in fact under a duty to support her, if he has in fact failed in such duty, and if he has money available for such purpose, he should be compelled to use it for the relief of his wife. With all this we agree. But should *anyone's* property be used for such alleged purpose, much less his debtor's property, without affording such a person the opportunity to deny the alleged relationship and the charges against him? Where is the governmental necessity for not affording such a person reasonable notice and an opportunity to be heard? If the need for relief of the alleged wife is urgent the State can afford to advance to the wife sufficient support, pending notice to the alleged husband and an opportunity to him to be heard, in the same manner that the State can and does advance moneys for the support of indigent persons who have no one legally bound to support them. The notice can be by publication and can be quite short, as reasonable notice is all that is required.

The Court of Appeals also states that the victim, the alleged husband, may if the jurisdictional facts are untrue, nullify the proceeding when he learns of the facts. That right is of no value to him, and much less to his

debtor, if the money has been spent, and since the entire proceeding is intended to afford the alleged wife immediate relief the money will unquestionably *be* spent. The Court of Appeals says (R., p. 54):

> "De Stefano will be unaffected by any adjudication made at any stage of these proceedings if the jurisdictional relation, the postulate behind the seizure, is found to be unreal."

But that learned Court adroitly overlooked the fact that no opportunity is afforded him to contest the relation until after the money is irretrievably gone. There is a vast difference between seizure without preliminary notice when it is to be followed by notice and a hearing before the property seized is administered, and the case at bar, where not only is the seizure without notice but the subsequent hearing, so-called, and the complete administration of the property is all to be had without notice to the owner, and the property taken is that of a debtor of the husband.

POINT A.

Though actual notice of the proceeding in the absence of a requirement therefor in the statute would not prevent the proceeding from being unconstitutional under the Fourteenth Amendment to the United States Constitution as a taking of property without due process of law, as we show hereinafter in Point C, nevertheless it appears in the case at bar that *no notice whatsoever was in fact had* by the depositor or the appellant bank.

While authorities hereinafter cited under Point C, conclusively show that, where a statute itself fails to contain provision for notice it matters not that the parties interested may in fact have had notice, the statute is nevertheless unconstitutional, yet it appears from the complaint (R., p. 15), the order of the two City Magistrates (R., pp. 16-17), and the affidavit of Henry M. Carpenter with the exhibits annexed thereto (R., pp. 21-27), which was nowhere contradicted by the appellee, that

> "*neither the defendant herein nor Raffaele De Stefano were made parties to the proceedings* in the Magistrate's Court, referred to in the complaint herein, *or had notice thereof, either constructively or otherwise, or appeared therein.* That *no process* or other notice of any kind whatsoever in the said proceedings in the Magistrate's Court or in this Court in this action *were served upon the defendant or the said Raffaele De Stefano other than the complaint* herein and copy of warrant which were served upon the defendant herein" (R., p. 23).

POINT B.

The Fourteenth Amendment to the United States Constitution affords protection to all sorts and kinds of property rights and includes choses in action such as a bank depositor's right to the payment to him of the moneys due him by the bank, and also protects the right of the bank to pay its debt to its depositor rather than to a stranger.

This proposition is fully sustained by the following authorities.

In *Chicago, Rock Island & Pacific Railway* v. *Sturm*, 174 U. S. 710, at page 716, it is said:

> *"A debt may be as valuable as tangible things.* It is not capable of manual seizure, as they are, but *no more than they can it be appropriated by attachment without process* and the power to execute the process. *A notice to the debtor must be given,* and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor."

In the more recent case of *Pennington* v. *Fourth National Bank of Cincinnati*, 243 U. S. 269, Mr. Justice Brandeis, in writing for this Court, said with regard to an order made with regard to a bank deposit in a matrimonial action, where the bank, under order of the Court, had made payment to the wife and the husband appealed

because no notice had been given him of the proceeding, at page 271:

> "The 14th Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. *That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the state. Chicago, R. I. & P. R. Co.* v. *Sturm,* 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. *Harris* v. *Balk,* 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084. Substituted service on a non-resident by publication furnishes no legal basis for a judgment *in personam. Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding *quasi in rem. Freeman* v. *Alderson,* 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power."
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> * * * * * * * * * *
>
> *"The only essentials* to the exercise of the state's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the *opportunity of the owner to be heard.* Where these essentials exist a decree for alimony against an absent defendant will be valid under the same circumstances and to the same

extent as if the judgment were on a debt; that is, it will be valid not *in personam*, but as a charge to be satisfied out of the property seized."

This case is, we submit, decisive of the case at bar. The principle involved is the same as in the case at bar. There a bank deposit was seized to pay alimony, while in the case at bar a bank account was seized to support a wife and child. In that case notice was essential, just as in the case at bar.

In *Davidson* v. *New Orleans*, 96 U. S. 97, at 102, it is said:

> *"But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law', can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."*

In *People ex rel. Simpson* v. *Kempner*, 154 App. Div. (N. Y.) 674, at 678, it is said:

> *"Nor do we think that a process which takes from the relator the custody of the articles pledged*

and delivers them to some one claiming against the validity of the pledge, thus leaving the apparent pledgee to exercise his remedies at law against the person to whom the articles are delivered, does not constitute a taking of property."

POINT C.

A statute which takes a person's property and turns it over to another, no matter under what guise it may be done, is in the absence of a provision requiring notice to the owner of the property, unconstitutional as violative of the Fourteenth Amendment to the United States Constitution, and this is so even where notice is in fact given as a matter of grace.

The provisions of the Federal Constitution protecting persons from unjust and unlawful seizure have ever been zealously guarded by the courts and in instances too numerous to mention the courts have uniformly condemned and annulled statutes which deprive persons of their property without due process of law and have held that an essential ingredient of due process of law is notice and an opportunity to appear and be heard.

Under the sections of the Code of Criminal Procedure under which the Commissioner of Public Welfare sought to act, *it is not contemplated that the court to which the return is made will give any notice, nor is it required to give such notice.* It matters not since the statute contains no provision for notice, whether the County Court or any other court, in any manner, at any time,

might give notice. As was stated in *Security Trust Co.* v. *Lexington,* 203 U. S. 323, at page 333, by this Court:

> "If the statute did not provide for a notice in any form, it is not material that *as a matter of grace or favor* notice may have been given of the proposed assessment. *It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is required by the statute.*"

In *Stuart* v. *Palmer,* 74 N. Y. 183, at page 188, it is said, the constitutionality of the statute is to be determined "not by what has been done under it, but by what may by its authority be done" * * * "It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must *require* notice to them and give them a *right* to a hearing and an opportunity to be heard."

The final word as to notice has been spoken by this Court in the case of *Windsor* v. *McVeigh,* 93 U. S. 273, which is relied upon by the Court of Appeals for the proposition that mere seizure constitutes sufficient notice, and which it will be seen does not sustain that contention, but the direct opposite. *Windsor* v. *McVeigh* was an action of ejectment to recover certain real property in the City of Alexandria, in the State of Virginia, brought under an Act of Congress to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes. Surely it cannot be contended that the offense of abandoning a wife and children, as heinous and unpardonable as it may be, can constitute a greater offense than trea-

son and rebellion, yet, in the case last cited, the Court at page 276 states the question for determination to be "whether the decree of condemnation thus rendered, without allowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was of any validity. In other words, the question is, whether the property of the plaintiff could be forfeited by the sentence of the Court in a judicial proceeding in which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded". Here is the United States of America, a sovereign power, seeking to proceed under an act providing for the punishment of treason, than which there can be no greater offense against the Government and against the citizens at large, and yet the Court *because of the denial to the party interested of the right to be heard* speaks in severest and most profound language condemning the order which the Court below had made, and at page 277 states:

> "'*The order in effect denied the respondent a hearing.* It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. *It would be contrary to the first principles of the social compact and of the right administration of justice.*'
>
> The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. *Wherever one is assailed in his person or his property, there he may defend,* for

the liability and the right are inseparable. *This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a Court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.*

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence. * * *

The position of the defendant's counsel is, that, as the proceeding for the confiscation of the prop-

erty was one *in rem*, the Court, by seizure of the property acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause, and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this Court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. *The jurisdiction acquired by the Court by seizure of the res was not to condemn the property without further proceedings.* The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. *A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture but a mere arbitrary edict of the judicial officer.* The seizure in a suit *in rem* only brings the property seized within the custody of the Court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by its agent, and that its seizure will, therefore, operate to impart notice to him. When notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the Court can proceed beyond the seizure to judgment. *The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has*

been afforded to its owner and parties interested to appear and be heard upon the charges. *To this end some notification of the proceeding, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential.* Such notification is usually given by monition, public proclamation, or publication in some other form. *The manner of the notification is immaterial, but the notification itself is indispensable."*

In *Twining* v. *New Jersey,* 211 U. S. 78, this Court, at page 110, says:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction. *Pennoyer* v. *Neff,* 95 U. S. 714, 733; *Scott* v. *McNeal,* 154 U. S. 34; *Old Wayne Life Association* v. *McDonough,* 204 U. S. 8, and that *there shall be notice and opportunity for hearing given the parties. Hovey* v. *Elliott,* 167 U. S. 409; *Roller* v. *Holly,* 176 U. S. 398; and see *Londoner* v. *Denver,* 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this Court has", etc.

"The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made *with notice to the parties affected and opportunity to be heard,* then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in

Iowa Central v. *Iowa*, 160 U. S. 393, 'But it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted gives *reasonable notice and affords fair opportunity to be heard* before the issues are decided', and in *Louisville & Nashville Railroad Company* v. *Schmidt*, 177 U. S. 230, 236: 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, *provided* in the proceedings which are claimed not to have been due process of law, *the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend.*' And in *Rogers* v. *Peck*, 199 U. S. 435: 'Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, *so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.*'"

Of similar purport is the case of *Roller* v. *Holly*, 176 U. S. 398, where the Court, at page 409, says:

> *"That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight;* but upon the question of the length of such notice there is a singular dearth of judicial decision."

There are so many similar decisions of the Federal and State courts that further citation of authority for the principles involved could serve no purpose.

From the foregoing citations it is apparent that the seizure of the depositor's cause of action against the bank and the recovery of judgment for the balance of his account, carrying with it the title and right of disposition of the property, all without notice, *and not incidental to an action or proceeding in which some notice is to be given,* cannot constitute notice so as to satisfy the requirements of due process of law.

It is also stated in *Ochoa* v. *Hernandez,* 230 U. S. 139, at page 161, as follows:

> *"Without the guaranty of 'due process'* the right of *private property cannot be said to exist,* in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. *Whatever else may be uncertain about the definition of the term* 'due-process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, *and without notice or an opportunity for a hearing."*

In *Wuchter* v. *Pizzutti,* 276 U. S. 13, this Court at page 15 states:

> "This case involves the validity, under the Fourteenth Amendment, of a statute of New Jersey providing for service of process on non-resi-

dents of the State in suits for injury by the negligent operation of automobiles on its highways."

* * * * * * * *

"Although the statute did not require it, notice of its proposed execution *was actually served personally* on Wuchter in Pennsylvania. Wuchter did not appear. A final judgment was entered. Wuchter then appealed to the court below, contending that the Act under which the process was served upon him was unconstitutional, because it deprived him of his property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the Federal Constitution."

* * * * * * * *

"The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision *making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement and we have not been shown any provision in any applicable law of the State of New Jersey requiring such communication.* We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the *Pawloski* case, that the act of a non-resident in using the highways of another state may properly be declared to be an agreement to accept service of summons in a suit growing out of the use of the highways by the owner of the automobile, but *the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to*

mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the Secretary of State or some officer of the state, *without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud* (*Heinemann* v. *Pier*, 110 Wis. 185) *or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law.*"

At pages 24-25 of the *Wuchter* case this Court quoted from *McDonald* v. *Mabee*, 243 U. S. 90-91, and said:

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. * * * No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. * * * And in states bound together by a Constitution and subject to

the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." See also *Roller* v. *Holly,* 176 U. S. 398.

"These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and *such notice was not required by the statute.* Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it. *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co.* v. *Stock Yards Company,* 212 U. S. 132, 144; *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127, 138; *Security Trust Co.* v. *Lexington,* 203 U. S. 323, 333; *Roller* v. *Holly,* 176 U. S. 398, 409; *Stuart* v. *Palmer,* 74 N. Y. 183, 188; *Berryhill* v. *Sepp,* 106 Minn. 458."

The syllabus in the case of *Kaukauna Co.* v. *Green Bay,* 142 U. S. 254, well sums up the decision in that case in the following language:

"Proceedings under a state statute enacted before the adoption of the Fourteenth Amendment, which, if taken before its adoption, would not have violated the Constitution, may, when taken after its adoption, violate it, if prohibited by the amendment."

POINT D.

The statute in question, purporting to assign to the Commissioner of Public Welfare the debt due the depositor, on an *ex parte* showing, without any notice whatsoever of the proceeding to the depositor, is violative of the Fourteenth Amendment to the United States Constitution.

The bank owes a debt to its depositor and was and is entirely willing to pay that debt. The statute, however, says it must pay an equivalent sum to the Commissioner of Public Welfare. This would clearly be unconstitutional, as the taking of one person's property for the benefit of another. The statute, therefore, attempts to go further and, as interpreted by the Court of Appeals, purports to create a statutory assignment of the debt. Yet that Court says that though the money may be paid over on that theory and used up, the depositor, because he has had no notice, may come in and under certain circumstances upset the proceeding and so recover from the bank. The mere statement of this proposition should be its own answer. Since the absence of notice makes the proceeding not binding on the depositor, under what theory can it be binding on the bank and justify the taking of the bank's property, which owes no duty to the alleged unfortunate wife or child and is a helpless, innocent party in the matter? Yet that is what the statute says and will do if not prevented by this Court. We respectfully submit that under the authorities herein cited this injustice should not and will not be tolerated. Of course a different question would be presented after notice, for in that case the proceeding would

be binding on the depositor and the bank could safely make the payment.

POINT E.

There is no similarity as counsel for respondent has heretofore claimed between the statute in question and warrants of attachment or sequestration proceedings in matrimonial actions, where notice following the seizure is provided for.

In actions in which warrants of attachment may be issued and in sequestration proceedings such preliminary and supplemental proceedings are merely proceedings incidental to the *main action* in which it is not only contemplated but always required that *notice be given* to the defendant. See *Pennington* v. *Fourth National Bank, supra,* Point B. It was for this reason that the Court of Appeals of New York, in *Matthews* v. *Matthews,* 240 N. Y. 28, was able to find Section 1171-a of the Civil Practice Act constitutional. In the latter case (at p. 32), it was expressly stated.

> "What the Legislature evidently intended to provide for was the case where a husband had property within the State and was concealing himself or else had disappeared so that personal service could not be made upon him. Under such circumstances, the Court, in the interest of his wife and children and the public generally, was authorized to seize his property without notice and hold it for legal disposition. By Article 54 of the Civil Practice Act, attachment was not provided for in matrimonial actions. This Sec-

> tion 1171-a attempted to provide a remedy in the nature of an attachment whereby *upon the commencement of an action* the husband's property could be seized and held for judgment or for orders *after notice.*"

The seizure was incidental to a definite cause of action by one person against another, a matrimonial action in which a summons *must* issue and be served upon the defendant to sustain the attachment.

In the case of *Matthews* v. *Matthews,* just referred to, it is further specifically stated (at p. 33), that the order for sequestration

> "* * * is the only step which by this section the Court is authorized to take without notice. This section recognizes and must be read in connection with the other provisions of the act which provide that where the defendant is a non-resident or conceals himself so that he cannot be found within the State, service may be made upon him by publication (Civ. Prac. Act, Sec. 232, subd. 5). In that case an order of sequestration may be made *but the service of the summons by publication must be commenced at once or within a reasonable time.*"

The Court further stated (at p. 34):

> "*It must be conceded that no judgment could be obtained for the disposition of the sequestered property without personal or constructive service upon the defendant.* We have no such thing in our practice; in fact there is no such thing in existence in the law as a personal judgment without service or notice of some kind, and the only

kind of notice that we recognize in this State for the obtaining of a judgment is personal service, substituted service or the service by publication *of the summons in the action.*"

We submit that the judgment in the instant case purports to transfer to plaintiff as his own in his official capacity the balance owing by the bank to its customer.

POINT F.

The mere so-called seizure of the debt due the alleged absconder was not sufficient notice to satisfy the constitutional requirement of due notice.

As pointed out above, the Court of Appeals sought to uphold the statute if notice was necessary, which it denied, by asserting that if notice was necessary it would be found in the seizure.

We submit that the cases of *Miller* v. *Lautenberg*, 239 N. Y. 142, cited by the Court of Appeals, or *Pennoyer* v. *Neff*, 95 U. S. 714, heretofore relied upon by counsel for the respondent, are not applicable to the case at bar. It is true that the Court in *Miller* v. *Lautenberg* said that seizure was notice, but it is vital to bear in mind, first, that the Court there was passing upon a war-time act, and further than that and what is of more vital importance, the distinction between the Trading-With-the-Enemy Act and Sections 921 and 925 of the Code of Criminal Procedure must be borne in mind. The Trading-With-the-Enemy Act is an act merely to put the Government in possession of property of alien enemies or of persons claimed to be alien enemies, but does not in any-

wise provide for the distribution of the proceeds thereof. This is left to future action. The Trading-With-the-Enemy Act is to this extent incomplete. The property is retained by the Alien Property Custodian as Trustee. The sections of the Code of Criminal Procedure, however, are complete in and of themselves, and by their terms not only provide for the seizure of property and the vesting of title in the officers named, but provide for its distribution immediately following such procedure and without notice of any kind whatsoever. Had the Trading-With-the-Enemy Act provided that the property by mere seizure and without notice of further proceedings, was forfeited, we do not believe that the Court would have held, as it did in the case of *Miller* v. *Lautenberg*. The Act would have then come within the condemnation of the case of *Windsor* v. *McVeigh, supra*, where, under an Act of Congress to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes, the forfeiture of property seized without notice was sought to be upheld, and it was there stated at page 277 that there must be notice to a party of some kind, actual or constructive, "beyond that arising from the seizure", to a valid judgment affecting his rights, and that, until notice is given, the Court had no jurisdiction in any case to proceed to judgment, whatever its authority might be by the law of its organization over the subject-matter, and it was further stated at page 278 that

> "the position of defendant's counsel is, that as the proceeding for the confiscation of the property was one *in rem*, the Court by seizure of the property acquired jurisdiction to determine its liability to forfeiture, and consequently had a right

to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot therefore be collaterally assailed. In supposed support of this position, opinions of this Court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property *without further proceedings*. The physical seizure did not of itself establish the allegations of the libel and could not therefore authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer."

While it is true that the Court, in *Windsor* v. *McVeigh*, states that the theory of the law is that all property is in the possession of its owner in person or by agent, and that its seizure will therefore operate to impart notice to him, yet this Court, in that case, was very careful to add, at page 279, that:

"The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded by its owners and parties interested to appear and be heard upon the charges. *To this end, some notification of the proceedings, beyond that arising from the seizure prescribing the time within which the appearance must be made, is essential. Such notice is usually given by monition, public proclamation, or publication*

in some other form. The manner of the notification is immaterial, but the notification itself is indispensable."

The case last cited establishes the unsoundness of the argument of the Court of Appeals that seizure of the deposit at the instance of a public officer was warning to the depositor that a proceeding had been begun, and the statute "told him, a resident of the state" (there is no proof of De Stefano's residence) "that a hearing would come on at the next term of the County Court", which terms are publicly appointed. Such implied notice could be nothing more than a fraud, first because the term of court might come on the next day and moreover the constructive notice by seizure not only could not and would not actually apprise the person whose property was seized of the time of hearing because the hearing is not set for the opening of the term but merely for the "next term of court", and assuming that he ascertained when the next term of court was to be held at which the hearing would be had, an effort to protect himself would require constant attendance (the proceeding being *ex parte*), that he might be at hand at the time the authorities, choosing at random of their own will, when they would seek a hearing and ask a confirmation of their earlier proceedings, happened to appear. And all of this might be of no avail when the proceeding actually came on, for the reason that he might not be granted a hearing at all since the statute nowhere gives him a *right* to be heard as a matter of law, and not of favor.

Moreover, in the case of *Security Savings Bank* v. *California*, 263 U. S. 282, cited in the case of *Miller* v. *Lautenberg* (*supra*), the statute there apparently pro-

vided (Code of Civil Procedure, Section 1272) for personal service on the bank and publication of the summons in a newspaper before the State might take over from the bank deposits which had not been claimed for more than twenty years, and the Court at page 287, stated:

> "These are generally considered proceedings strictly *in rem*. But whether the proceeding should be described as being *in rem* or *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over deposits are that there be seizure of the *res* at the commencement of the suit and *reasonable notice and opportunity to be heard*. Compare *Pennoyer* v. *Neff*, 95 U. S. 714, 724; * * *"

The case of *Pennoyer* v. *Neff*, 95 U. S. page 714, cited in the case of *Miller* v. *Lautenberg* (*supra*), supports the contention in the case of *Security Savings Bank* v. *California* (*supra*), and is not an authority for the proposition that mere seizure of property supplies sufficient notice. The Court in *Pennoyer* v. *Neff*, at page 727, says that

> "*substituted service by publication, or in any other authorized form*, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. * * * In other words, such service may answer in all actions which are substantially proceedings *in rem*."

In the case of *Ackerman* v. *Ackerman*, 55 N. J. L. 422 (27 Atl. 807), which concerned a statute for the relief of poor relatives, quite similar to the statute under con-

sideration in the case at bar, which New Jersey statute the Court states

> "may be traced back in our legislation to Section 17 of the 'Act for the Settlement and Relief of the Poor', passed March 11, 1774, which section re-enacted with some modifications the Act of 43 Elizabeth, Chapter 2, Section 7."

The Court further states:

> *"'Without doubt, the relative against whom the order is applied for, must have reasonable notice and an opportunity to be heard.'"*

In the case of *Faling* v. *Multnomah County*, 46 Ore. 460 (80 Pac. 1009), which is a proceeding of similar nature, the Court, at page 464, states:

> "The Court could not very well direct the relative to discharge the duty thus enjoined upon him *without according him a hearing*, and for such purpose it would not be improper to cite the alleged delinquent to appear before it to show cause why the direction should not be made."

POINT G.

The statute in question cannot be supported as a regulation under the police power, where notice may be dispensed with in certain cases as fire and flood where the maxim *salus rei-publicae suprema lex* applies.

We respectfully submit that the statute may not be regarded as a regulation for the exercise of the police power of the State or as one dealing with an emergency as critical as fire, epidemic, flood, or similar emergencies, where the maxim, *salus rei-publicae suprema lex* applies. Where an emergency, such as fire, flood, or epidemic confronts the people, there is nothing for the State to do but to meet it by such means as are sufficient to overcome it, whether this means affects or destroys private property or otherwise. The perils and necessities of such emergencies cannot be applied to persons about to become a charge upon the State. If the persons about to become a public charge upon the State were about to become such, not by reason of the absconding of a parent, but because of the death of the parent or his incapacitation, the danger would be just the same and the State would be required to support them. In cases of emergency, such as floods, fires or epidemics, the need for immediate action is imperative. In no other manner may they be met. Such immediate action is in nowise necessary to procure the support of dependent persons. If the State be required to support them temporarily, nothing calamitous will happen to the State or to the individuals concerned if property of persons responsible for the support of dependents is seized, held by the State, and upon

notice to the person claimed to be charged with the support of the dependents, the property sold or disbursed, and the State reimbursed for such expenditures as it has already made, and the balance by order of the Court, after such notice, disbursed for the support of the dependents.

POINT H.

The antiquity of the statute is of no importance except in cases of ambiguity, when it may be considered in determining the proper construction of the statute. Where the language of the statute is clear and precise and the meaning evident the statute will be declared unconstitutional no matter how long it has been in existence.

This statement is abundantly supported by the following authorities:

In the case of *Fairbank* v. *United States,* 181 United States Reports, 283 at page 310, this Court, holding a tax law to be unconstitutional, although similar laws had been passed by Congress repeatedly since the earliest times and had been enforced by government officials during that time, said:

> "Thus, in *Swift Company* v. *United States,* 105 U. S. 691, 695, Mr. Justice Matthews said:
>
> 'The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, *applies only in cases of ambiguity and doubt.*'

In *United States* v. *Graham*, 110 U. S. 219, 221, Chief Justice Waite thus stated the law:

'Such being the case it matters not what the practice of the departments may have been or how long continued, for *it can only be resorted to in aid of interpretation*, and "it is not allowable to interpret what has no need of interpretation". If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. *But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid.* The cases to this effect are numerous.'

In *United States* v. *Tanner*, 147 U. S. 661, 663, it was said by Mr. Justice Brown:

'If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States* v. *Graham*, 110 U. S. 219; *Swift Company* v. *United States*, 105 U. S. 691. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.'

and continued at page 312:

'But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.' "

Willoughby on the Constitution of the United States, Vol. 1, Second Edition, notes to page 51, quotes the following language from Story's *Commentaries*:

> "Contemporary construction", says Story, in his *Commentaries*, "is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit to which it is entitled. It can never abrogate the text; it can never fritter away the obvious sense; it can never narrow down its true limitations, it can never enlarge its natural boundaries."

In the case at bar the language of the statute is absolutely clear and precise, and the meaning of the statute is perfectly evident. Under such circumstances its unconstitutionality should be declared even though the statute is an ancient one.

POINT I.

The appellant bank has the right to raise the question of the constitutionality of the act and thereby protect its own property rights.

As to the suggestion as to the right of the bank to raise the question of the unconstitutionality of the entire enactment, since the entire enactment affects a direct right of the bank, there can be no doubt as to its interest in the statute and in the litigation under it, and it would follow that if it has any interest in the statute and the litigation thereunder, it would have a right to question the constitutionality.

The defendant bank has no property belonging to the husband, the relation between a bank and a depositor therein being merely that of debtor and creditor, which is established by a long list of cases, among others the following:

Erb v. *Banco di Napoli*, 243 N. Y. 45 (49);
Aetna National Bank v. *Fourth National Bank*, 46 N. Y. 62;
Shipman et al. v. *Bank, State of New York*, 126 N. Y. 318;
General Fire Assurance Co. v. *State Bank*, 177 App. Div. (N. Y.) 745.

All the husband, the depositor, had was an intangible thing, *i. e.*, a cause of action against the bank for the debt if it refused to pay upon demand.

A bank has title to a deposit and can be called upon only to return the equivalent amount to its depositor. The business of a bank is to receive deposits, and out of these deposits to loan money upon which it receives interest. It has a right to retain the deposit and to make loans thereon until called upon by the depositor for the payment of an equivalent sum. If the statute takes away this deposit, the right and interest of the bank is necessarily affected, especially as the Court of Appeals admits it might have to pay the depositor even after it had made payment to the Commissioner of Public Welfare. The interests of the plaintiff in the action of *Roberts & Schaefer Co.* v. *Emerson*, 271 U. S. page 250, cited by the Court of Appeals, are not at all analogous to the interest of the bank in the present instance. At page 54 of that case it is stated:

> "But the plaintiff is not in a position to raise this question. As this Court has often held, one

> who challenges the validity of said taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities or such as do not affect him, but *must show that he is himself affected unfavorably* by the discrimination of which he complains."

This the appellant has shown.

But the controlling precedent is that of *Pierce* v. *Society of Sisters*, 268 U. S. 510, where it was held by this Court that an Act of the State of Oregon compelling all children to attend public schools was unconstitutional upon the ground that the liberty of the children's parents in choosing the child's school was unwarrantably interfered with. The plaintiffs in that case, however, were not parents but corporations conducting private schools, and it was held that as property rights of the schools were affected by such legislation the schools had sufficient interest to maintain the action and question the constitutionality of the statute. In other words the constitutional rights invaded were those of others, but by that invasion the plaintiffs' property was affected, which gave them a standing before this Court.

A fortiori, in the instant case the appellant is more clearly entitled to question the constitutionality of the statutes in question here not only because the respondent cannot state a cause of action unless the statutes are constitutional, but further because the appellant has a clear property right which has actually been invaded and which it is seeking to protect, to wit, the principal amount of the judgment for which amount, if the statute is unconstitutional, it will be again liable in an action by the depositor after paying the judgment in this action and also interests and costs incurred in this action as

contained in the judgment herein, which action was instituted not by appellant but by appellee, and which interests and costs must be met and paid out of the property of the bank not included in the account of its depositor.

POINT J.

The judgment and order of the Court of Appeals of the State of New York, dated the 31st day of December, 1928, in this cause, should be reversed, with costs in this court, the Court of Appeals of the State of New York, the Appellate Term of the Supreme Court of the State of New York, First Department, and in the City Court of the City of New York; and the judgment of the City Court of the City of New York, first entered, bearing date October 18th, 1927, in favor of the Corn Exchange Bank, should be reinstated and affirmed, and this cause remanded to the Clerk of the City Court of the City of New York, with directions to said Clerk and the Justices of said court to take appropriate action to carry out the decree of this court.

Respectfully submitted,

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HENRY M. CARPENTER,
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Of Counsel.

APPENDIX.

For convenient reference by the Court, Sections 921-925 of the Code of Criminal Procedure are here set forth. They are as follows:

"§921. *Parents leaving their children chargeable to the public, how proceeded against.*

(a) When the father, or the mother, absconds from the children, or a husband from his wife, or a wife from her husband, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother, husband or wife is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding.

(b) Whenever any child shall be committed to an institution pursuant to any provision of law, any criminal court or magistrate may issue a summons or warrant for a parent of the child or any other person required by law to maintain or support such child, and examine into his or her ability to maintain such child in whole or in part; and if satisfied that such parent or other person is able to contribute toward the support of the child, then such court or magistrate shall, by order, require the weekly payment by such parent or other person of such sum and in such manner as shall be in said order directed, toward

the maintenance of such child in such institution, which amount when paid shall be credited by the institution to the city, town or county against any sums due to it therefrom on account of the maintenance of such child. In case any city, town or county shall have paid any sums to any such institution on account of the maintenance of such child on the request in writing of the officers in charge of the administration of the poor law for such city, town or county, such criminal court or magistrate may at any time within five years after such payment issue a summons or warrant, as above, for the parent, or other persons required by law to maintain or support such child, may examine into his or her ability to maintain such child, in whole or in part, and may make an order for the repayment to such city, town or county, in whole or in part, of the sums so expended by it on account of the maintenance of such child.

§922. *Seizure of their property; transfer thereof, when void.*

The officers so applying may seize and take the property, wherever it may be found in the same county; *and are vested with all the rights and title thereto which the person absconding then had.* The sale or transfer of any personal property, left in the county, from which he absconded, made after the issuing of the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the

county where they reside, there to be filed." (Italics ours.)

"§923. *Warrant and Seizure, when confirmed or discharged; direction of the court thereon.*

The court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied toward the maintenance of the children or spouse of the person absconding.

§924. *Warrant, in what cases to be discharged.* If the party against whom the warrant issue, return and support the spouse or children so abandoned, or give security satisfactory to any two justices of the peace, or police justices in the city, village or town to the overseers of the poor of that town, or in the city of New York, to the commissioners of charities and corrections, that the spouse or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

§925. *Sale of the property seized and application of its proceeds.*

The officers must sell at public auction the property ordered to be sold, and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor, the

officers charged therewith must apply the same to the support of the wife or children so abandoned; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statute. They must also account to the county court of the county, for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time."

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Supreme Court of the United States.

OCTOBER TERM, 1929, NO. 36.

~~(October Term, 1928, No. 687.)~~

THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

REPLY BRIEF OF APPELLANT.

SPOTSWOOD D. BOWERS,
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THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

REPLY BRIEF OF APPELLANT.

Statement.

This reply brief was rendered necessary because of the somewhat misleading manner in which the facts are stated in the respondent's brief and the unjustified conclusions of law drawn therefrom.

POINT I.

In answer to statement of the case found on pages 2 to 5 of appellee's brief.

In stating the facts of the case the appellee has drawn largely for his allegations of fact from the affidavit of the alleged wife (R., p. 28), and the affidavit of Christopher J. Dunn, Deputy and Acting Commissioner of

Public Welfare of the City of New York (R., pp. 25, 26), which are annexed to the moving affidavit of Henry M. Carpenter, one of the appellant's attorneys, solely for the purpose of showing that in the Magistrate's Court, also known as the Domestic Relations Court, no process or other notice of any kind whatsoever was ever served upon the defendant or said Raffaele De Stefano (R., pp. 23, 24).

The appellant's motion to dismiss was properly made upon the complaint alone. These affidavits were added not to amplify that motion, and for that purpose they could not be considered by the Court nor could they add to nor detract from the sufficiency of the complaint, but were added merely for the purpose of informing the Court that not only did the statute fail to provide for notice or the complaint allege notice, but that *in fact* no notice was given, to the end that the Court, if it deemed the complaint insufficient, of course without considering such affidavits for the reasons advanced in the notice of motion, could finally dismiss the complaint without affording the plaintiff the usual opportunity to amend which, in this case would be clearly idle, without having to go into the question whether or not a notice not provided for by the statute would be sufficient compliance with the due process clause, which by the way it would not. Otherwise the Court might have permitted the plaintiff to amend the complaint so as to show if he could that notice had in fact been given to the alleged husband. These affidavits are, therefore, wholly irrelevant to the questions presented upon this appeal. As the appellee has departed from the facts alleged in the complaint, it will be necessary to briefly state what the practice in New York is upon a motion addressed to the complaint, such as was made in this case. As we stated in our main brief, the question arises upon a

motion equivalent to a demurrer to the material allegations of the complaint. (New York Civil Practice Act, Sec. 277; N. Y. Rules of Civ. Prac., Rule 106, *infra* appendix, p. 20). In New York State the method of pleading prescribed by the former Code and the present Civil Practice Act—as distinguished from the former of practice in the State and from the practice in many other states—was designed to require the allegation of facts rather than the merely formal and unilluminating "common counts", and the allegations must be in form stated to be made by the party pleading. (N. Y. Civ. Prac. Act, Sec. 276, Sec. 241, *infra* appendix, page 19; *Bush* v. *Prosser,* 11 N. Y. 347; *Conaughty* v. *Nichols,* 42 N. Y. 83; *Adams* v. *Dodge,* 114 Misc. Rep. 565, 567; affirmed without opinion 196 App. Div. 957.) Likewise, under the New York Practice, only the *material* allegations of the complaint need be denied by the defendant and the defendant's failure to deny *immaterial* allegations does not imply their admission. (N. Y. Civ. Prac. Act, Sec. 261, *infra* appendix, page 19; *Linton* v. *Unexcelled Fire Works Co.,* 124 N. Y. 533; *Fry* v. *Bennett,* 5 Sand. 54; *Connoss* v. *Meir,* 2 Ed. Smith 314; *Sands* v. *St. John,* 36 Barb. 24; *Brown* v. *Cody,* 23 App. Div. 210; *Adams* v. *Dodge, supra.*) It is quite clear, therefore, that the only facts admitted by the defendant's motion are the material facts stated to be made by the party pleading, contained in the complaint. Although this seems self-evident to those familiar with New York practice, the appellee, as we have stated, in his statement of the facts has departed from the material allegations of the complaint and has stated the facts as if uncontroverted, contained in the affidavit of the alleged wife, which were only a part of the proceedings in the Magistrate's Court, also called the Domestic Relations Court,

to which the defendant-appellant was not a party and in which neither the defendant nor the alleged absconding husband ever received any notice (R., pp. 28-29). In other words, the appellee is attempting to bolster up the allegations of the complaint with the allegations of the alleged wife in the *ex parte* proceedings in the Magistrate's Court. This would be proper enough if the alleged husband had been afforded any form of notice in those proceedings, and this Court should carefully bear in mind that those allegations of the alleged wife have never been proved as against either this defendant or the alleged husband, nor has either been afforded any opportunity to controvert them. This merely emphasizes our contention that notice to the alleged husband is necessary to make these alleged facts binding as against the appellant or its depositor. We admit the due proof of these facts according to the statute in question, but we do not admit that the statute, by providing as it does for their proof without any notice, is constitutional under the Fourteenth Amendment to the United States Constitution.

The only facts which in any way can be said to be colorably admitted by the defendant are the allegations contained in paragraph numbered "Fourth" of the complaint, which reads as follows:

> "Upon information and belief that Mary De Stefano is the wife of Raffaele De Stefano, and that her child is the issue of said marriage, and that said Raffaele De Stefano abandoned his wife and infant child and absconded from the State of New York" (R., p. 16).

The allegations contained in paragraph numbered "Fifth" of the complaint are in substance that in accordance

with Sections 921 and 922 of the Code of Criminal Procedure upon due proof that said Raffaele De Stefano abandoned his wife and infant child, leaving them in danger of becoming a charge upon the public, and absconded from the State of New York, a warrant of seizure was issued, etc. (R., p. 16), are in no sense the equivalent of an allegation that Raffaele De Stefano did abandon his wife and infant child and did leave them in danger of becoming a charge upon the public, and did abscond from the State of New York, but are merely a statement that such alleged facts were proved in an *ex parte* proceeding in the Magistrate's Court. It is, therefore, not alleged in controvertible form in the complaint, and is therefore not admitted by the defendant that the matrimonial domicile of De Stefano and his alleged wife was ever in the State of New York, or that he ever failed to provide for his wife and infant child, or that they ever were in any danger of becoming a charge upon the public. It is therefore quite possible, as the Court of Appeals of the State of New York admits, that at any time De Stefano might reappear in the State of New York and satisfactorily disprove these facts, whereupon the appellant would, according to the opinion of the Court of Appeals, be again liable to De Stefano for the amount for which it has been held liable to the Commissioner of Public Welfare, the appellee.

As to the allegations contained in paragraph numbered "Fourth" of the complaint, we have stated that these allegations might colorably be said to have been admitted by the motion for judgment on the complaint, but this is only colorably so, and we believe in fact they have not been so admitted. The plaintiff deemed these allegations merely to have been alleged as a "matter

of inducement" (*McGarahan* v. *Sheridan*, 106 App. Div. 532; *Hall* v. *Tyler*, 104 Fed. Rep. 757; 31 Cyc. 102), which allegations, while permissible to make clear the rest of the complaint, are not strictly germane to the cause of action, and are therefore not material allegations which are deemed to be admitted by failure to deny them. This becomes clear when it is considered that the statutes under which the proceeding was brought declare by their own express terms that the plaintiff in this action was already vested with title to the property of De Stefano at the time of the commencement of the action by virtue of the proceedings in the Magistrate's Court beyond any power of the appellant bank to dispute, unless those statutes are unconstitutional. Section 922, which is set forth in full on page 50 of our main brief, provides in part as follows:

> "The officers so applying may seize and take the property, wherever it may be found in the same county; *and are vested with all the rights and title thereto which the person absconding then had.*"

The statute clearly contemplated that the divesting of De Stefano's property was complete before the institution of this action, and we therefore cannot see how the appellant by merely putting the allegations contained in paragraph "Fourth" in issue would constitute any defense, if we assume the statutes to be constitutional.

By way of further confusing the issue, the appellee has cited under the statement of the case Sections 1163 and 1166 of the New York Civil Practice Act on page 2 of its brief. Those sections relate solely to actions for divorce or separation, in which actions it may, by the way, be stated that notice to the defendant is always provided for.

It is stated on page 3 of the appellee's brief that the warrant of seizure was returnable at the next term of the County Court, Bronx County. This statement may be confusing as the statute does not contemplate that it was returnable in the sense that a motion is made returnable, but it provides (Section 922 of the Code of Criminal Procedure, p. 50 of our Main Brief) in part:

> "The officers must immediately make an inventory of the property seized by them and return it, together with their proceedings before the next County Court of the county where they reside, there to be filed."

POINT II.

A.

In answer to appellee's Point I.

On page 6 of the appellee's brief, the appellee states that appellant's contention that it has a right to retain the deposit and make loans thereupon until called upon by its depositor for the payment of an equivalent sum, is inexact, in that the appellant's right is to lend money, but not the money of its depositor, but its own money. It seems to us that this distinction, so far as the rights of the appellant is here concerned, is one without a difference. If the appellant is deprived of the amount of the judgment in this case, it is poorer by that amount and has that much less money available for the purposes for which it was organized. If a bank were deprived of all its deposits, it obviously would have to cease to do business. If it is deprived of one of its deposits, its right to do business is impaired by that amount. Fur-

thermore, the appellant has not only been deprived of the amount of the deposit, but has been subjected to costs and the disbursements of the action without being in any way at fault itself.

On page 7, the respondent states that the appellant was free to make loans, but it is obvious that it was free to make less loans than it was before, being poorer by that amount.

On the bottom of page 7, it is stated that no property of the appellant bank was, or was attempted to be seized by the warrant, but the judgment obtained in favor of the appellee is a personal judgment against the bank, subjecting the bank's property to execution, and, as the Court of Appeals has expressly stated, would not prevent De Stefano from suing the bank for the amount of its indebtedness to him. It therefore cannot be De Stefano's property that is being taken away from the bank, for the bank may still be indebted to him.

On page 9 the appellee argues that the statute, having been in existence prior to the making of the deposit, thereby became a part of the contract between the appellant and its depositor. But the contract was not made with De Stefano as a husband, nor was it made for aught that appears with any knowledge that he had a wife and that he was domiciled with her in the State of New York, or in fact that he was a resident of the State of New York at all at that time. It is a matter of common knowledge that banks have many accounts with non-residents and foreigners.

On page 11 and the subsequent pages, the appellee devotes much learning to the proposition that a husband and father is under a legal obligation to support his wife and child, and it suggests that it would be more in conformity with the decencies of civilization that De

Stefano should support his wife and child, rather than that they be temporarily supported by the State pending an investigation, with notice to De Stefano that he was in fact the husband and had not fulfilled his legal obligation to support his wife and child; but the question here presented is not whether a husband should be compelled to support his wife and child, but whether, without any notice or opportunity to be heard, a person should be adjudged to be a husband and father and adjudged to have failed in his duty to support his wife and child, and a third person, who is merely his debtor, be compelled to pay the debt to the State, to be at once administered for the support of an alleged wife and child without any opportunity for the alleged husband to contest that fact. Respondent has cited Genesis, Mark and Ephasians for the support of this extraordinary proposition. Needless to say, these religious authorities lend no color to such a proposition. but merely voice the doctrine, that, spiritually speaking, husband and wife are one. Even in Biblical days, no man was permitted to be condemned without an opportunity to be heard. (Deuteronomy, Chap. 19, Verses 15 to 19.)

Again on page 12, the appellant unwarrantably assumes that the allegations contained in the affidavit of the alleged wife in the proceedings in the Magistrate's Court are binding upon this appellant and appellee states—as if it were uncontested—that De Stefano abandoned his wife and child, leaving them "without means and in danger of becoming charges upon the public."

On page 13, appellant states that we admit that this happened in the case at bar, citing the complaint therefor, but, as we have already stated, the complaint contains no such allegations, but merely states that such

facts were proved *ex parte* in the Magistrate's Court's proceedings. The argument of the appellant found on page 13 apparently is that because of the primary and essential right of self-preservation, the Government need not support destitute women and children, but may merely, upon a colorable claim that such women and children have absconding husbands, without any notice to such alleged absconding husband for an opportunity to be heard, confiscate not only their property, but may in addition compel a bank where such husband happens to have a bank account to pay over the amount of its indebtedness to the Commissioner of Public Welfare, even though the Court of Appeals admits in its opinion in this case that by reason of lack of notice to the husband of the proceeding he may at any time come in and attack the proceeding, and if successful in showing that he was not an absconding husband compel the bank to pay him an amount equivalent to the amount which the bank had previously paid the Commissioner of Public Welfare.

Furthermore, irrespective of what allegations the appellant is deemed to have admitted, we contend that *it is unconstitutional to compel an innocent third party to assume the burden of defending another's wrong under penalty of losing his property if he does not.* The taking of property which is protected by the Fourteenth Amendment to the Constitution does not have to be a direct taking. The fallacy of the appellee's contention is made apparent if we consider an analogous state of facts: *Would a statute which permitted A, who claimed to have a cause of action against B, a non-resident of the State, upon proof that C was indebted to B, to sue C for the amount C owed B, proving against C that he had a cause of action against B, and compelling C to pay A unless he is able to disprove A's alleged cause of action*

against B be constitutional? We think a mere statement of this query contains its own answer and that such a statute would be clearly an unwarranted deprivation of C's property without due process of law. The results of the statutes in the case at bar are *precisely* the same as the case we have assumed.

B.

Further answering appellee's Point I—Appellant could not have interpleaded De Stefano under the law of the State of New York.

On page 14 of the respondent's brief, it is stated that the appellant could have fully protected itself by interpleading its depositor, De Stefano. Nothing would have been more welcome to the appellant than to have taken such a course, *but appellant under the statutes of New York had no such right* for the allegations of the complaint are that De Stefano absconded from the State of New York on or about Sept. 21, 1923 (R., p. 16, fol. 42), which was over four years before the action was begun, which establishes the fact that he is a non-resident for the purpose of acquiring jurisdiction over him (*Haggart* v. *Morgan*, 1 Selden 422; *Collins* v. *Campfield*, 9 How. Prac. 519). It has been repeatedly held by the decisions of the State of New York that a third party (except possibly a resident of the State temporarily away) to be interpleaded must be *personally served within the State* of New York, and that no substituted service against such a person who is not within the State is permissible (*Devoy* v. *Nelles*, 197 App. Div. 628; *Hanna* v. *Stedman*, 230 N. Y. 326; *Bullowa* v. *Provident Life & Trust Co.*, 125 App. Div. 545; and

also see *N. Y. Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518, 521, 522).

In *Devoy* v. *Nelles, supra*, the Court said at page 629:

> "The action is brought to recover the sum of $5,000 upon the theory of money had and received by the defendant to the use of the plaintiff.
>
> Section 820 of the Code of Civil Procedure requires that notice of the application for an order of interpleader shall be given to the claimant and the adverse party.
>
> The affidavits of service of the notices on the alleged claimants do not state where either of them was served. The obvious purpose of such a notice is to bring the claimant before the Court and give him an opportunity to assert his claim. It has somewhat the effect of a summons and must be served in the same manner as a summons is required to be served.
>
> The affidavit of defendant shows that he wrote to the claimant, treasurer Hugh Montague, addressing him as residing at 127 Autumn Street, Passaic, N. J., and that Montague in making answer to that letter refers to his place of business as at No. 1 Montgomery Street, Jersey City, N. J. The presumption which was conceded upon the argument is that Montague was served in the State of his residence. In our opinion there was not proof of a valid service upon the alleged claimant Clan Na Gael.
>
> The Court cannot acquire jurisdiction by service of the notice on a non-resident outside the State, either by personal service, or by substituted service, and such service is not a compliance with the requirement as to notice of Section 820 of the Code.

In *Bullowa* v. *Provident Life & Trust Co.* (125 App. Div. 545) the Court said (at p. 548): 'The Code requires notice to the party to be brought in and does not leave it to the Court to prescribe what that notice shall be. It necessarily follows that it must be personal notice or the equivalent thereof, and it needs the citation of no authorities to show that the courts of one state cannot obtain jurisdiction over citizens and residents of another state by notice served by mail or served personally without the State. It is also evident that these provisions of the Code of Civil Procedure contemplate that the notice shall be such that the Court may thereby obtain jurisdiction over the party without the service of other process and may thereupon, if the facts warrant it, make the order discharging the original defendant and substituting the new defendant thus brought in on notice. *It would seem, therefore, that this section of the Code of Civil Procedure does not authorize such a substitution of a non-resident unless service is made personally within our own State or the party voluntarily appears and submits to the jurisdiction of the Court.*'

This is a personal action and not one *in rem.* The most recent utterance on that subject is the Court of Appeals in *Hanna* v. *Stedman* (230 N. Y. 326). To the same effect is *Rosenthal* v. *United Transportation Co.* (196 App. Div. 540).

In *Hanna* v. *Stedman* (*supra*) the head note correctly summarizes the opinion as follows: '2. Actions or proceedings *in rem* have for their subject specified property which is within the jurisdiction and control of the Court to which application for relief is made and do not include an action of interpleader wherein the plaintiff sought and obtained a judgment determining to

which one of several conflicting claimants it should pay moneys conceded by it to be due upon a personal claim to some one.'

It follows that so far as Hugh Montague, as treasurer of the Clan Na Gael, is concerned the order must be reversed."

POINT III.

In answer to appellee's Point II.

On page 15 of the appellee's brief, the case of *Windsor* v. *McVeigh*, 93 U. S. 274, 279, is quoted from, the appellee, however, carefully deleting therefrom the most important part of that opinion, which immediately succeeds the portion quoted by him, which we have set forth on pages 26 and 27 of our main brief and which, for emphasis, we here again repeat:

> "That right must be recognized and its exercise allowed before the Court can proceed beyond the seizure to judgment. *The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard* upon the charges. *To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential.* Such notification is usually given by monition, public proclamation, or publication in some other form. *The manner of the notification is immaterial, but the notification itself is indispensable.*"

On page 16 and again on page 17 the appellee again relies upon the affidavit of the alleged wife in the Magistrate's Court's proceedings to sustain his supposedly conceded facts—particularly on page 17 he states that the appellant's depositor resided with his wife and child in the Borough of Bronx. This is nowhere alleged in the complaint and is not conceded by the appellant's motion.

On pages 18 and 19 of the appellee's brief, the appellee again attempts to sustain these statutes on the ground that the State for its own self-preservation may compel husbands to support their wives. We do not question the State's right to compel husbands to support their wives. We merely challenge the right of the State to arbitrarily, without a hearing—for no real hearing is provided for unless ample notice is to be given—taking property from alleged husbands, who may not be in fact husbands, for the support of their alleged wives who may not in fact be in any necessity for such provision, and *a fortiori* we challenge the right to compel a bank to pay over moneys of its own to the Commissioner of Public Welfare on the theory he has a statutory assignment of the debt due to the alleged absconding husband, to whom no notice has been given or provided for, and who may, therefore, recover from the bank, if he shows he does not come within the provisions of the statute in question. Thus the bank may be compelled to make double payment of its debt.

POINT IV.

In answer to appellee's Point III.

Point III of the appellee's brief raises the question of the right of the appellant to challenge the constitutionality of the statute in question, and has been sufficiently answered by Point I of our main brief found at

pages 45 *et seq.*, and we particularly again call the attention of this Court to *Pierce* v. *Society of Sisters*, 268 U. S. 510. In this point, the appellee also again suggests that the appellant should have interpleaded its depositor, and we again state that the appellant, under the laws of New York, was prevented from doing so.

Not only may the appellant bank be subjected to double liability, which is clearly a sufficient property interest to raise the question, but it has already been subjected to a judgment for costs, which in and of itself would give it a right to question the validity of the proceedings which rendered such judgment permissible, including unconstitutionality of the statute in so far as it affected its debt to its depositor (see *Croker* v. *New York Trust Co.*, 245 N. Y. 17).

POINT V.

In answer to appellee's Point IV.

In Point IV of the appellee's brief it is stated that the judgment should be sustained, among other things, for the reasons set forth in the prevailing opinion of the Appellate Term of the Supreme Court of the State of New York. That opinion differs considerably from the opinion of the Court of Appeals. The constitutionality of the statute is sustained in that opinion on the theory, among others, that the mere ancientness of the statute makes it constitutional (R., p. 42). The Court of Appeals on the other hand conceded that it could not sustain the constitutionality of the statute upon its age alone. It is true that the Fourteenth Amendment, as the Court of Appeals says, was itself a historical document, but it

was founded upon a lofty tradition of justice, and not upon isolated and obscure and unjust statutes which were probably unknown and unconsidered by our constitution makers. Just as an isolated and ill-considered decision, no matter how hoary with age, does not establish the common law when it is out of harmony with the rest of our case law (*Russey* v. *N. Y. & M. E. R. R. Co.*, 133 N. Y. 79, 85; *Garland* v. *State of Washington*, 232 U. S. 642; 1 Kent's Com., 13 Ed. 477), so, too, an isolated and unjust statute, no matter how ancient, cannot establish what is due process of law when it is out of keeping with the spirit and tradition which lies back of the due process clause. Our constitution makers certainly did not intend to sanctify every manner and kind of obscure and ancient practice. Would witch burning and trial by ordeal be tolerated as due process of law? Would the summary imprisonment of juries for daring to find a verdict contrary to what the trial Judge deemed to be the weight of the evidence be considered due process of law? Yet, such was the ancient practice in not only England but also in the Colonies (Columbia Law Review, Vol. XXIV, February 1924, No. 2, at p. 112).

Furthermore, in so far as the opinion of the Appellate Term intimates that some form of notice would be given to De Stefano in the proceedings in the Magistrate's Court, the opinion of the Appellate Term has been overruled by the opinion of the Court of Appeals, which concedes that no notice is provided for or can be given under the statute in question.

POINT VI.

The judgment and order of the Court of Appeals of the State of New York, dated the 31st day of December, 1928, in this cause, should be reversed, with costs and disbursements in this Court, the Court of Appeals of the State of New York, the Appellate Term of the Supreme Court of the State of New York, First Department, and in the City Court of the City of New York; and the judgment of the City Court of the City of New York, first entered, bearing date October 18th, 1927, in favor of the Corn Exchange Bank, should be reinstated and affirmed, and this cause remanded to the Clerk of the City Court of the City of New York, with directions to said Clerk and the justices of said Court to take appropriate action to carry out the decree of this Court.

Respectfully submitted,

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APPENDIX.

New York Civil Practice Act.

Section 241. PLEADINGS: WHAT TO CONTAIN. Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence by which they are to be proved.

Section 261. CONTENTS OF ANSWER. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim.

Section 276. CONSTRUCTION OF ALLEGATIONS IN VERIFIED PLEADINGS. The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

Section 277. DEMURRER ABOLISHED: OJECTIONS TO PLEADINGS, HOW TAKEN. The demurrer is abolished. An objection to a pleading in point of law may be taken by motion for judgment as the rules provide.

New York Rules of Civil Practice.

RULE 106. MOTION FOR JUDGMENT: WHEN THE DEFECT APPEARS ON FACE OF COMPLAINT. Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, where it appears on the face thereof:

1. That the Court has not jurisdiction of the person of the defendant.

2. That the Court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties for the same cause.

5. That the complaint does not state facts sufficient to constitute a cause of action.

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM 1929

No. 36

THE CORN EXCHANGE BANK,
Appellant,

against

BIRD S. COLER, Commissioner of Public Welfare of The City of New York,
Appellee.

BRIEF FOR THE APPELLEE.

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Supreme Court of the United States

OCTOBER TERM 1929

No. 36

THE CORN EXCHANGE BANK,
Appellant,

against

BIRD S. COLER, Commissioner of Public Welfare of The City of New York,
Appellee.

ON APPEAL ALLOWED BY THE CHIEF JUDGE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLEE.

The opinions delivered in the Courts below are officially reported in:

250 N. Y. 136,
132 Misc. 449.

PRELIMINARY

Unless otherwise indicated all references to statutes in this brief are to the statutes of the State of New York. The opinion of the State Court of Appeals (R. p. 47) and the prevailing opinion of the Appellate Term of the State Supreme Court (R. p. 39) are relied upon as correct statements of the law and the facts in this litigation. It is anticipated that they will be given most careful consideration by this Court. Therefore, they are not extensively quoted in the following pages.

Statement of the Case.

On or about January 5, 1926, one Raffaele De Stefano, then residing (see Civil Practice Act §1166 infra p. 27) in the Borough of The Bronx, City of New York, without justification (Civil Practice Act §1163, infra p. 26) abandoned (Code of Criminal Procedure §899 sd. 1, infra p. 29) his wife, Marie De Stefano (R. p. 28, fol. 77) and their infant child Leo (R. p. 28, fol. 78) and absconded from the State of New York (R. p. 30, fol. 83) leaving them without means (Inferior Criminal Courts Act of The City of New York §74, infra p. 37) and in danger of becoming charges upon the public (Poor Law §2, infra p. 47, Greater New York Charter §683, infra p. 34). At the time of his abandonment of his wife (Inferior Criminal Courts Act of The City of New York §74, infra p. 37) and child (Penal Law, §§481, 482, infra p. 47). De Stefano had an account in the appellant bank (R. p. 30, fol. 83) in the sum of $2,030 (R. pp. 28-29, fols. 78-79).

On or about September 21st, 1926 (R. p. 19, fol. 50). The City of New York (Inferior Criminal Courts Act of The City of New York §74, infra p. 38, Greater New York Charter §§657, 659, 662, infra p. 32), acting through its Deputy and Acting Commissioner of Public Welfare, duly filed a petition (R. pp. 25-27) in a non-criminal proceeding (Code of Criminal Procedure §6, infra p. 28) in the City Magistrates Court, designated (Inferior Criminal Courts Act of The City of New York, §74, infra p. 36) as the Domestic Relations Court (Constitution of the State of New York, Art. VI, §18, infra p. 23), charging that the said Raffaele De Stefano, had, without justification (Civil Practice Act §1163, infra p. 26) abandoned his wife and infant child and absconded from the State of New York (See R. p. 30, fol. 83), leaving them without

means and in danger of becoming charges upon the public (R. p. 26, fol. 70, and see R. p. 28, fol. 78) and praying the issuance, pursuant to sections 921 and 922 of the Code of Criminal Procedure, et seq. (infra p. 29), of a warrant, authorizing the Commissioner of Public Welfare of The City of New York (Greater New York Charter §103, as amended by Laws of 1920, Chap. 79, §2, infra p. 31) to seize the property of the said Raffaele De Stefano, to wit, the sum of $2,030 on deposit (Banking Law §2, infra p. 24) to his credit with the appellant bank, so that the property so seized might be applied (Poor Law §130 as amended by Laws of 1924, Chap. 471, §1, infra p. 48) under the direction and control of the County Court of Bronx County (Code of Criminal Procedure §§39, sd. 9, infra p. 28., and 923, infra p. 30) to the support and maintenance of De Stefano's wife and child (R. pp. 26-27, fols. 72-73).

The warrant of seizure so prayed for was duly (Inferior Criminal Courts Act of The City of New York §72, infra p. 35) issued under the hands and seals of two City Magistrates on September 21st, 1926 (R. pp. 18-19). It was returnable at the next term (Code of Criminal Procedure §922, infra p. 30, Judiciary Law §192, infra p. 47) of the County Court, Bronx County (R. p. 19, fol. 50) and was served on the appellant bank on September 22, 1926 (R. p. 17, fol. 44). The appellant bank refused to deliver (R. p. 17, fol. 44) the amount of the deposit with it, made by the absconding husband and father, De Stefano (R. p. 16, fols. 41-42), to the appellee Commissioner of Public Welfare (R. p. 17, fol. 44), and thereafter this action (Civil Practice Act, §6, infra p. 25) for the recovery of the amount of the said De Stefano's deposit in the appellant bank was duly commenced on June 27, 1927 (R. p. 9, fol. 20). The appellant bank did not answer (Civil Practice Act §260, infra p. 26) the

complaint (R. pp. 14-15) herein, but, admitting all of its material allegations (Civil Practice Act §243, infra p. 26) moved (Civil Practice Act §277, infra p. 26) for its dismissal (R. p. 20, fol. 53) upon the ground, variously expressed (R. p. 61):

> That sections 921-925 of the Code of Criminal Procedure deprived the appellant and its depositor De Stefano and either or both of them, of property without due process of law (R. pp. 18-19).

The appellant's motion was successful at the Special Term of the City Court of the City of New York (R. p. 10) and resulted in a judgment dismissing the complaint (R. pp. 11-12). From this judgment the appellee duly (Civil Practice Act §267) appealed (R. p. 10) to the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, which reversed the judgment of the City Court of the City of New York and directed judgment for the appellee for the amount (R. p. 17, fol. 45) claimed in the complaint herein with costs (R. p. 33, fol. 93). From the judgment in the total sum of $2,211.50 thereafter duly entered in the office of the Clerk of the City Court of the City of New York on October 3, 1928 (R. pp. 4-5), the appellant appealed (Civil Practice Act §588, sd. 3), on October 23, 1928, to the Court of Appeals of the State of New York (R. pp. 4-5), which, on December 31, 1928, affirmed the judgment so brought before it and remitted the case to the City Court of The City of New York (R. p. 1) where judgment of affirmance and for costs was duly entered on January 22, 1929 (R. pp. 58-59). An appeal to this Court was allowed (General Rule 36) by the Chief Judge of the Court of Appeals of the State of New York on January 18, 1929 (R. pp. 56-57).

The appellant's assignments of error are in substance:

(1) The complaint (R. pp. 16-17) herein does not state facts sufficient to constitute a cause of action (R. p. 20, fol. 54) because sections 921 and 922 of the Code of Criminal Procedure conflict with the 14th amendment to the Constitution of the State of New York, in that they deprive the appellant and its depositor De Stefano of its, his or their property without due process of law (R. p. 55);

(2) That the appellee had no legal capacity to sue and the Court in which this action was commenced was without jurisdiction of the subject matter thereof (R. p. 21, fol. 57) because sections 921 and 922 of the Code of Criminal Procedure conflict with the 14th Amendment to the Constitution of the United States in that they deprive the appellant and its depositor De Stefano of its, his or their property without due process of law (R. p. 56).

The appellant's definite statement of the points upon which it intends to rely (R. p. 61), like its specifications of error (Appellant's Brief, pp. 5-6), restate, in other language, its asssignments of error (R. pp. 55-56), but add a further contention that the appellant's property right in the fund in controversy, viz, the amount on deposit with it to the credit of the absconding (R. p. 30, fol. 83) husband and father (R. p. 28, fol. 78) is sufficient to enable it to urge in this Court that sections 921-925 of the Code of Criminal Procedure are unconstitutional as they affect it and its depositor, De Stefano (R. p. 62).

POINT I.

The appellant was not deprived of any property without due process of law.

The only right which the appellant claims to have with regard to the deposit with it of $2,030 by the absconding husband and father, De Stefano (R. p. 14, fols. 41-42) is

> "a right to retain the deposit and to make loans thereon until called upon by the depositor for the payment of an equivalent sum" (Appellant's Brief, p. 46).

The appellant's position is inexact. Its relationship with the absconding De Stefano was that of debtor and creditor (Appellant's Brief, p. 46). The contract which it made, when it opened an account with him, was

> "to receive his deposits and honor his checks upon presentation."
>
> 1, Bolles, Modern Law of Banking, Chapter XVI, §1, Chapter XIII, §2.
>
> 7 C. J. p. 672 §381, p. 679 §402.

To lend money is one of the general powers (Banking Law §106, infra p. 24) of the appellant, but the money which it lends is its own money (Appellant's Brief, p. 46), not that of its depositors.

> *New York County National Bank* v. *Massey*, 192 U. S. 138, 145;
>
> *Gardner* v. *Chicago Title & Trust Co.*, 261 U. S. 453, 456.

The warrant (R. pp. 18-19), whose dishonor by the appellant (R. p. 17, fol. 44), was the cause of this litigation (R. p. 17, fol. 44), did not distrain the funds of the appellant bank; it merely seized the "personal property" (Code of Criminal Procedure §921, infra p. 29) of the absconder, De Stefano (R. p. 16, fol. 42; p. 18, fol. 48), which, as the appellant admits (Appellant's Brief, p. 46), was the sum of $2030 (R. p. 16, fol. 41, Civil Practice Act §243, infra p. 26) that it owed (Appellant's Brief, p. 33) to the absconding De Stefano, who, more than 18 months after his abandonment of his wife and infant (R. p. 28, fol. 77), disclosed his whereabouts, as Cairo, Egypt (R. p. 30, fol. 83).

The warrant did not, in any sense, abridge or impair the right of the appellant to conduct or continue its banking business. It was as free to make loans (Appellant's Brief, p. 46) after the service (R. p. 17, fol. 44) of the warrant (R. p. 18) herein, as it was before.

That the debt of $2030 (R. p. 16, fol. 41) owing (Appellant's Brief, p. 33) from the appellant to its depositor De Stefano (R. p. 30, fol. 83) was property within the State of New York (R. pp. 28-29, fols. 78-79; p. 30, fol. 83), and subject to the jurisdiction of its Courts, is incontestable.

> *Omaha National Bank* v. *Federal Reserve Bank,* 26 F. 2d. 884, 888, certiorari denied 278 U. S. 615;
>
> *DeGanay* v. *Lederer,* 250 U. S. 376, 381-382;
>
> *Pennington* v. *Fourth National Bank,* 243 U. S. 269, 271.

No property of the appellant Bank was, or was attempted to be, seized by the warrant. Notice to the appellant of the application (R. p. 18, fol. 47) to the

two City Magistrates for the warrant of seizure which they issued (R. p. 19, fols. 50-51) would serve no purpose of interest to it. There was no issue which the appellant could, possibly, raise, either before or after the return of the warrant, except as to whether or not Marie De Stefano and Leo De Stefano (R. p. 28, fols. 77-78) were respectively the wife and child of the appellant's depositor De Stefano (Opinion below, R. p. 52).

If the appellant was not indebted to the absconder De Stefano, there was nothing for the appellee to

> "seize and take ' * * * * * and return * * * to the next county court * * * * *,' " (Code of Criminal Procedure §922 intra p. 30).

If the amount of its indebtedness to De Stefano (Appellant's Brief, p. 33) was less than that specified in the warrant (R. p. 19, fol. 49), the statute (Code of Criminal Procedure §921, infra p. 29) did not authorize the seizure of anything in excess of

> "the property of the person so absconding." (Code of Criminal Procedure §921 infra p. 30).

Altogether, nothing was involved in the seizure, which gave the appellant, a mere debtor (*People* v. *Mechanics & Traders Savings Inst.*, 92 N. Y. 7, 9), of De Stefano (R. p. 16, fol. 41, *supra* p. 6), any shadow of right to question the authority of the two City Magistrates to issue the warrant in controversy, to challenge the validity of the warrant itself, or to be heard with regard to the circumstances of the case upon its return to the County Court of Bronx County (R. p. 19, fol. 50, Code of Criminal Procedure §923, infra p. 30) upon any other question than that of De Stefano's marriage and parenthood.

The statute (Code of Criminal Procedure, §921, infra p. 29) under which the appellee procured the warrant of seizure herein, having been

> "in force long before the absconding husband made his deposit in the defendant bank and long before his marriage." (Opinion below, R. p. 51.)

was as much a part of the contract between the appellant and its depositor De Stefano as any other of its terms,

> *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 189;
>
> *Penney* v. *Nelson,* 183 U. S. 144, 147;
>
> *McCullough* v. *Virginia,* 172 U. S. 102, 116;
>
> *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242, 249;
>
> *St. Paul Fire & Marine Ins. Co.* v. *Eldrasher,* 33 F. 2d. 675, 682,

and in the event of action thereunder by the appellee (Code of Criminal Procedure §914, infra p. 29, Greater New York Charter, §657, infra p. 32) the only things open to challenge by the appellant were, as above stated, the marriage and parenthood of its absconding depositor. But, upon the return of the warrant to the next County Court, of whose sitting the appellant was chargeable with notice (Judiciary Law §192, infra p. 47, Greater New York Charter §1528, infra p. 35), these were things which, with all other matters affecting the merits, had to be judicially determined before the warrant could be confirmed.

As used in Section 923 of the Code of Criminal Procedure (infra p. 30), the words

> "The court, upon inquiring into the circumstances of the case,"

import an independent

> "judicial investigation of the questions of fact"
>
> *Matter of Gill,* 95 App. Div. 174, 175,

in which the appellee was bound

> "to produce some evidence to establish the case charged in the warrant."
>
> *People* v. *Overseers of the Poor of Triangle,* 23 Barb. 236, 239,

and wherein the defendant De Stefano (R. p. 25, fol. 67) had the protected right

> "to appear and defend in person and with counsel * * * "
>
> Constitution of the State of New York Art I §6, infra p. 23.
>
> *People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463, 484.

Indeed "the rights and title" (Code of Criminal Procedure §922, infra p. 30) of the appellee to De Stefano's deposit with the appellant bank, were not only defeasable by failure of confirmation of the warrant by the County Court (Code of Criminal Procedure §923, infra p. 30), but also by De Stefano himself (Code of Criminal Procedure, §924, infra p. 30), not only before, but, at any time after the confirmation of the warrant.

The only object which the statutes assailed by the appellant served was that of forestalling the substantial charges (Greater New York Charter, §§662, 664, infra p. 32, Code of Criminal Procedure §887, infra p. 28)

upon the revenues of the City of New York which would accrue if the appellee had failed to make

> "an investigation into the circumstances" (Greater New York Charter §662, infra, p. 32).

of the destitute wife and child (R. p. 28, fol. 78) who were abandoned by the appellant's depositor, De Stefano.

> *People* v. *Spear*, 133 Misc. 141, 142;

leave to appeal to the Court of Appeals denied by that Court, New York Law Journal, December 8, 1928, p. 1167.

In the State of New York, the obligation of a husband and father to support his wife and child is legal, primary and inescapable.

> *Wetmore* v. *Markoe*, 196 U. S. 68, 73, 75;
>
> *De Brauwere* v. *De Brauwere*, 203 N. Y. 460, 464;
>
> *Laumeier* v. *Laumeier*, 237 N. Y. 357, 364;
>
> *Zwingman* v. *Zwingman*, 150 App. Div. 358, 360.

It might not be calamitous for the State to be required temporarily to support the destitute wife and child of the absconding (R. p. 30, fol. 83) De Stefano (R. p. 28, fol. 78), as the appellant suggests (Appellant's Brief, p. 42). But, on the other hand, it would be no more calamitous, and certainly more in conformity with the decencies of civilization and his obligations as a husband and a father, if De Stefano were to do that himself.

> Genesis 2: 24
>
> Mark 10: 8
>
> Ephesians 5: 25-33

Sohm—Institutes of Roman Law, §§48, 49, 94, 95.

2 Pothier on Obligations 27.

1 Blackstone—Commentaries 442, 447.

2 Kent—Commentaries 146.

Pomeroy—Municipal Law §§742, 749.

1 Bishop—Marriage, Divorce and Separation §§1184, 1202.

30 C. J. 516-518 §29.

The statute (§921, infra p. 29) under which the warrant (R. p. 18) in controversy was issued and that upon which its confirmation depended (§923, infra p. 30) had no other aim than the support of the wife and child (§924, infra p. 30) whom the appellant's depositor (R. p. 30, fol. 83) abandoned (R. p. 28, fol. 78). Such support out of the bank account (R. p. 30, fol. 83) which the appellee seized (R. p. 18) on September 22, 1926 (R. p. 17, fol. 44) could be as temporary as the absconder (R. p. 16, fol. 42) De Stefano, was interested to make it (§924, infra p. 30). Neither the State of New York (Constitution of New York, Art. VII, §1, infra, p. 24) nor the City of New York (Constitution of New York, Art. XII, §1, infra p. 24) is an eleemosynary institution, and no person may be said to have any natural or other right to go therefrom to Cairo, Egypt (R. p. 30, fol. 83), for instance, leaving a wife or child in the City of New York,

> "without means and in danger of becoming charges upon the public" (R. p. 28, fol. 78).

Immediately upon the happening of such an event, and

the appellant admits (Civil Practice Act, §243, infra, p. 26) that it did happen in the case at bar (R. p. 16), fols. 41-42).

> "the primary and essential right of self preservation; which, so long as human governments endure * * * cannot be denied,"
>
> *Gitlow* v. *New York*, 268 U. S. 652, 668;
>
> *Williams* v. *Turner*, 194 U. S. 279, 294;
>
> *Del Ponte* v. *Societa Italiana Di Marconi*, 27 R. I. 1, 70 L. R. A. 188, 191;
>
> *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 363,

required the appellee to take the steps which he did take (R. p. 25) not because of any sympathy (Appellant's Brief, p. 16) for a destitute wife and child (R. p. 28, fol. 78), but in the faithful discharge of his duty (Constitution of New York, Art. XIII, §1, infra, p. 24) to prevent the public moneys of the City of New York from being applied to the maintenance of the family of a person, himself able to support them (Greater New York Charter §683, infra p. 34).

By its failure to comply with the requirements of the warrant (R. p. 18), served upon it on September 22, 1926 (R. p. 18, fol. 44), the appellant did more for its absconding depositor than he could do for himself.

This action predicated upon the warrant was not commenced until June 27, 1927 (R. p. 3, fol. 2). With the commencement of this action, any claim, however tenuous, that, by the proceedings of the appellee before the Magistrate, the appellant was deprived of its property without due process of law (R. p. 21, fol. 55) vanished. If it so pleased, the appellant was then in a position to require the appellee to prove by competent,

relevant and material evidence each and every allegation of the complaint (R. p. 16) herein, which it did not care to admit, and by proof, adduced on its own behalf, to establish, e. g., that the conduct (In re *West*, 108 Fed. 940, 941) of its depositor De Stefano (R. p. 30, fol. 83) did not justify any conclusion that he had abandoned his wife and child (R. p. 16, fols. 41-42), and/or that Mary De Stefano was not the wife (R. p. 16, fol. 41) nor Leo De Stefano the child (R. p. 28, fol. 78) of the appellant's depositor. For these purposes all the liberal facilities provided by Article 29 of the New York Civil Practice Act were open to it. When, on September 21st, 1927 (R. p. 30, fol. 83) the appellant received a demand from its depositor De Stefano for almost the entire amount of the seized deposit (R. p. 17, fol. 44) it could have interpleaded (Banking Law, §113, infra, p. 25) or impleaded (Civil Practice Act, §287, infra p. 26) him, and relieved itself, entirely, of any burden in this action. Nothing prevented it from doing either or both of these things immediately upon the commencement of this action.

The appellant, for reasons satisfactory to itself, preferred, however, to ignore the remedies which the statutes of the State of New York, provided for its protection, and to admit (Civil Practice Act, §243, infra p. 26) each and every material allegation of the complaint herein. By so doing it took any facts which might tend to defeat or invalidate the warrant (R. p. 18) involved herein, so far as it had any proper concern therewith, out of the realm of controversy (Opinion below R. p. 54).

That the Courts of the State of New York resolved this action against it, furnished the appellant with no grievance.

POINT II.

The appellant's depositor, DeStefano, was not deprived of his property without due process of law.

In *Windsor* v. *McVeigh*, 93 U. S. 274, 279, this Court said:

> "The seizure in a suit in rem only brings the property seized within the custody of the Court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by its agent, and that its seizure will, therefore, operate to impart notice to him. When notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed."

See also to the same effect:

The Mary, 9 Cr. 126, 144.

Miller v. *Lautenberg*, 239 N. Y. 132, 136;

Zimmerman Coal Co. v. *Coal Trading Ass'n of Rotterdam*, 30 F. 2d. 933, 934;

The Ann, 8 Fed. 923, 927.

The application to the Magistrates by the City of New York (R. p. 25) for a warrant of seizure of the property of the appellant's depositor, De Stefano (R. p. 26, fol. 71), pursuant to Section 921 of the Code of Criminal Procedure (infra, p. 29) was nothing if not the institution of a proceeding in rem, justiciable in the County Court (Code of Criminal Procedure, §923, infra p. 30). Its highest purpose was to compel the appellant's depositor to

> "return and support" (Code of Criminal Procedure §924, infra p. 30).

the wife and child he had abandoned (R. p. 28, fol. 78)

> "or give security" (Code of Criminal Procedure §924, infra p. 30).

that they

> "shall not be chargeable to the county" (id).

The statutes under which the appellee proceeded in the case at bar did not deny or attempt to deny the appellant's depositor, DeStefano, a hearing (see *Zimmerman Coal Co.* v. *Coal Trading Ass'n of Rotterdam*, 30 F. 2d. 932, 924) or refuse him the right to appear (*Windsor* v. *McVeigh*, 93 U. S. 274, 276, 284). They did not even place a limit of time (see Code of Criminal Procedure §924, infra p. 30) upon his constitutionally protected right

> "to appear and defend in person and with counsel * * * " (Constitution of the State of New York, Art. I, §6, infra p. 23).

and, upon proper proof or assurance to receive back the property which was seized for the purpose of applying it to the maintenance of the child and wife (Code of Criminal Procedure, §923, infra p. 30) he had abandoned (R. p. 28, fols. 77-78).

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States * * * "
>
> *In re Burrus*, 136 U. S. 586, 593-4;
>
> *Simms* v. *Simms*, 175 U. S. 162, 167;
>
> *Popovici* v. *Popovici*, 30 F. 2d. 185;
>
> *Ditson* v. *Ditson*, 4 R. I. 87.

From the mere fact of the residence (Civil Practice Act §1166, infra p. 27) of the appellant's depositor with his wife and child in the Borough of Bronx (R. p. 28, fol. 77) the Court below was entirely justified in holding (R. p. 51), that the legislation which the appellant challenges

> "was as much an incident of the family relation as dower or curtesy or any other marital right."
>
> See 19 C. J. 433 §69.

In the case at bar, except for the additional fact that the public, through its authorized representative is the seeker for relief,

> "It must be borne in mind that the object of the proceeding is to enforce a duty which the husband owes to his family,* * * by proceeding against his property after the defendant puts it beyond the power * * * " (*Rhoades* v. *Rhodes* 78 Neb. 495, 111 N. W. 122, 125).

of his wife and child to receive from him personally the support and maintenance to which they are entitled.

Under the statutes in question the seized property of the appellant's depositor, De Stefano, did little more than stand as bail (*In re Mitchell,* 278 Fed. 707, 709; *Bryan* v. *Bernheimer,* 181 U. S. 188, 196) for his satisfaction of his continuing duty to support and maintain his wife and child and keep them from becoming charges upon the public revenues.

There is nothing in the Constitution of the United States which prevents the States from defending themselves against the diversion or diminution of their public revenues because husbands may, as the appellant's depositor De Stefano did (R. p. 28, fols. 77-78), abandon their wives and children to the undemandable charity

of municipalities; and the Federal Constitution prescribes no limitation upon the means which the several States may adopt to protect themselves against such deserters.

For the purposes of description, the title of the appellee to the bank deposit of the absconder De Stefano may be likened to a common law lien (*Peck* v. *Jenness*, 7 How. 612, 620), and the warrant (R. p. 18), under which the appellee seized may well be likened to the ancient "distringas" (1 Bouvier, Law Dictionary, p. 590, Black, Law Dictionary, p. 280) or "distress" (18 C. J. 1289-1290, 1 Bouvier, Law Dictionary, p. 586, Black, Law Dictionary, p. 378). But these comparisons and illustrations are not as illuminating for the purpose of comprehending the nature of the process by which the appellee was authorized to assume possession and a qualified title to De Stefano's property, as the *"legis actio per pignoris capionem"* (see 2 Bouvier, Law Dictionary, p. 671; Black, Law Dictionary, p. 898) handed down to us from Roman antiquity (Sohm, Institutes of Roman Law, §48, pp. 236-238, §49, note 13, p. 251), which still endures, in the Federal system of jurisprudence, in the distress warrant issuable by executive authorities against certain delinquent officers and their sureties (U. S. Code, title 31, §§506-511).

In effect, the statutes whose validity the appellant contests are addressed to the same object as section 201 of the War Risk Insurance Act (40 Stats. L. 402, 610) under which the enlisted personnel of our military forces during the World War had deducted from their pay fixed sums for the support of their wives and children, without regard to their personal wishes in the matter.

The legislation which the appellant challenges has no conflict with the Tenth Amendment to the Constitution of the United States and is not forbidden by the

Constitution of the State of New York. The obvious end which it served was the preservation of the State and its lesser municipalities. That it was obliged to use force for that high purpose does not make its act unconstitutional, because of any provision of the Fourteenth Amendment.

Martin v. *Hunter's Lessee,* 1 Wheat. 304, 363;

Williams v. *Turner,* 194 U. S. 279, 294;

Gitlow v. *New York,* 268 U. S. 652, 658;

Del Ponte v. *Societa Italiana Di Marconi,* 27 R. I. 1, 70 L. R. A. 188, 191.

POINT III.

The appellant may not question the constitutionality of sections 921-925 of the Code of Criminal Procedure.

All that the appellant had to do to protect itself to the utmost in this litigation, was to pay the fund into Court and interplead its depositor, De Stefano as provided in section 287 of the Civil Practice Act (infra p. 26) or, in the alternative, proceed in the litigation as provided for in Section 113 of the Banking Law (infra p. 25) retaining the fund as therein provided, and interpleading the absconding husband, De Stefano. That would conclude its relation to the litigation. It has no third party interest in the fund sufficient to entitle it to put in issue the question of constitutionality of the Statute. The appellant has no interest in the fund to safeguard that could not have been fully protected by interpleading the absconding husband as above indicated. It was its duty under the law so to proceed, and it has no *right* upon which to base an attack upon the constitutionality of the Statute. It is indeed strange that the appellant did not rely upon the usual presumption of the constitutionality of sections 921 to 925 of the Code of Criminal Procedure (infra pp. 29-31) and make the very common and obvious motion to interplead the depositor De Stefano in the action against it. Instead, the appellant took upon itself the task, on behalf of its depositor, of attacking the constitutionality of the aforesaid provisions of the Code of Criminal Procedure.

Expressly on the point that the appellant is not "affected unfavorably" by the warrant of seizure to the extent necessary to enable it to put in issue the question of constitutionality of the statute, see

Roberts & Schaefer v. *Emerson*, 271 U. S. 50 at pp. 54, 55,

referred to (R. p. 45, fol. 19) in the prevailing opinion at the Appellate Term. That the appellant, under the law, was required to interplead the absconding husband, and deposit the fund in the City Court under section 287 of the Civil Practice Act (infra p. 26) or retain it pursuant to the provisions of Section 113 of the Banking Law (infra p. 25), the Court is referred to the recent case of *Newhall* v. *Longacre Bank,* 248 N. Y. 252, 254, decided by the Court of Appeals on May 29, 1928.

The appellant in the instant case concededly owes the money on deposit to the absconded husband, and the plaintiff in the action, the Commissioner of Public Welfare, has, by the statute (infra p. 30) the right to possession thereof for the support and maintenance of the destitute wife and child, subject to defeasance by the County Court of the County of the Bronx if the fact of abandonment be not proven.

The lack of any *right* in the bank upon which it could lawfully base an attack upon the constitutionality of the statute, and its inability to show that it was "affected unfavorably" by the Warrant of Seizure (R. p. 18), and its duty under the law, requiring it to deposit the fund in Court and interplead the husband under Section 287 of the Civil Practice Act (infra p. 26) or interplead the husband and retain the fund as provided in Section 113 of the Banking Law (infra p. 25) and thereby relieve itself of any future possible litigation in regard thereto, justifies, in itself, and without consideration of any other matters discussed herein, the summary affirmance of the determination of the Court below. In this connection see also

Shaw v. *Board of Drainage,* 160 Ky. 422, at p. 432.

POINT IV.

For the reasons set forth in the opinion of the Court of Appeals of the State of New York, and in the prevailing opinion at the Appellate Term of the Supreme Court of the State of New York, and herein, the judgment and determination appealed from, should be affirmed with costs.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CONTROVERSY

Neither constitutional nor statutory provisions are set forth at length in the following quotations, except where the provisions in their entirety have a bearing upon this case.

Constitution of the United States

14TH AMENDMENT

"* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of New York

ARTICLE I.

§6. * * * In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions, * * * nor be deprived of life, liberty, or property without due process of law; * * *.

ARTICLE VI.

§18. The legislature may establish * * * courts of domestic relations, as separate courts, or as parts of existing courts or courts hereafter to be created, and may confer upon them such jurisdiction as may be necessary * * * and to compel the support of a wife, child, or poor relative by persons legally chargeable therewith, who abandon or neglect to support any of them. * * * *.

ARTICLE VII.

§1. The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association or corporation.

ARTICLE XII.

§1. It shall be the duty of the legislature to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, * * * *.

ARTICLE XIII.

§1. * * * All officers, executive and judicial, * * * shall, before they enter on their duties of their respective offices, take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ---------- according to the best of my ability; * * *.

Banking Law

§2. The term "bank" when used in this chapter, * * * means any domestic moneyed corporation, * * * authorized to * * * receive deposits of money. * * *.

§106. In addition to the powers conferred by the general and stock corporation laws, every bank shall, * * * have the following powers:

1. To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; * * * by receiving deposits; * * *.

§113. 1. In all actions against any bank to recover for moneys on deposit therewith, if there be any person or persons, not parties to the action, who claim the same fund, the court in which the action is pending, may, on the petition of such bank, and upon eight days' notice to the plaintiff and such claimants, and without proof as to the merits of the claim, make an order amending the proceedings in the action by making such claimants parties defendant thereto; and the court shall thereupon proceed to determine the rights and interests of the several parties to the action in and to such funds.

The remedy provided in this section shall be in addition to and not exclusive of that provided in section eight hundred and twenty of the code of civil procedure.

2.The funds on deposit which are the subject of such an action may remain with such bank to the credit of the action until final judgment therein, and be entitled to the same interest as other deposits of the same class, and shall be paid by such bank in accordance with the final judgment of the court; or the deposit in controversy may be paid into court to await the final determination of the action, and when the deposit is so paid into court such bank shall be struck out as a party to the action, and its liability for such deposit shall cease.

3. The costs in all actions against a bank to recover deposits shall be in the discretion of the court, and may be charged upon the fund affected by the action.

Civil Practice Act

§6. The term "civil action" means any action except an action prosecuted in the name of the people of the state as plaintiffs against a party charged with crime.

§243. Each material allegation of the complaint not controverted by the answer, * * * must be taken as true for the purposes of the action. * * *

§260. The only pleading on the part of the defendand, is an answer.

§277. * * * An objection to a pleading in point of law may be taken by motion for judgment * * *.

§287. * * * A defendant against whom an action to recover upon a contract is pending at any time before answer upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him may apply to the court upon notice to that person and the adverse party for an order to substitute that person in his place and to discharge him from liability to either, on his paying into court the amount of the debt or delivering the possession of the property or its value to such person as the court directs; or, upon it appearing that the defendant disputes in whole or in part the liability as asserted against him by different claimants or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court, in its discretion, may make such order upon such terms as to costs and payments into court of the amount of the debt or part thereof or delivery of the possession of the property or its value or part thereof as may be just, and thereupon the entire controversy may be determined in the action.

§1163. The defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff; and if that defense is established

to the satisfaction of the court, the defendant is entitled to judgment.

§1166. If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

§1171a. Where in an action for divorce or separation, it appears to the court that the defendant is not within the state, or cannot be found therein, or is concealing himself therein, so that process cannot be personally served upon him, the court may at any time and from time to time make any order or orders without notice directing the sequestration of his property, both real and personal and whether tangible or intangible, within the state, and may appoint a receiver thereof, or by injunction or otherwise take the same into his possession and control. The property thus sequestrated and the income therefrom may be applied in whole or in part and from time to time, under the direction of the court and as justice may require, to the payment of such sum or sums as the court may deem it proper to award, by order or judgment as the case may be, and during the pendency of the action or at the termination thereof, for the education or maintenance of any of the children of a marriage, or for the support of the wife, or for her expenses in bringing and carrying on said action and the proceedings incidental thereto or connected therewith; and if the rents and profits of the real estate, together with the other property so sequestrated, be insufficient to pay the sums of money required, the court, upon such terms and conditions as it may prescribe, may direct the mortgage or sale of sufficient of said real estate to pay such sums. The court may appoint the wife receiver or sequestrator in such cases. The court may authorize the

wife to use and occupy, free of any liability for rent or use and occupation or otherwise, any house or other suitable property of her husband as a dwelling for herself or herself and her children, and may likewise turn over to her for the use of herself or herself and her children any chattel or chattels of her husband. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law.

Code of Criminal Procedure

§6. A criminal action is prosecuted in the name of the people of the State of New York, as plaintiffs, against the party charged with crime.

§7. The party prosecuted in a criminal action is designated in this Code as the defendant.

§39. The county courts embraced in this chapter have jurisdiction:

* * * * * *

9. To exercise the powers conferred by law in relation to the estates of persons absconding and leaving their families chargeable to the public.

§887. The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment:

* * * * * *

5. A person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highways, passages, or other public places, to beg or receive alms;

§899. The following are disorderly persons:

1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;

2. Persons who threaten to run away and leave their wives or children a burden upon the public;

§901. If the magistrate be satisfied, from the confession of the defendant, or by competent testimony, that he is a disorderly person, he may require that the person charged give security, by a written undertaking, with one or more sureties approved by the magistrate, to the following effect:

1. If he be a person described in the first or second subdivision of section eight hundred and ninety-nine, that he will pay to the county superintendent of the poor or to the overseer of the poor of the town, city or village, or to a society for the prevention of cruelty to children, weekly for the space of one year thereafter a reasonable sum of money to be specified by the magistrate for the support of his wife or children.

§914. The father, mother and children, if of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepit so as to be unable by work to maintain himself, must, at their own charge, relieve and maintain in a manner to be approved by the overseers of the poor of the town where he is, or in the city of New York, by the Commissioners of public charities.

§921. (a) When the father, or the mother, absconds from the children, or a husband from his wife, or a wife from her husband, leaving any of them chargeable or likely to become chargeable upon the public, the officers

mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother, husband or wife is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officer so applying to take and seize the property of the person so absconding. * * * *.

§922. The officer so applying may seize and take the property, wherever it may be found in the same county; and are vested with all the rights and title thereto which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after the issuing of the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the county where they reside, there to be filed.

§923. The court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied towards the maintenance of the children or spouse of the person absconding.

§924. If the party against whom the warrant issued, return and support the spouse or children so abandoned, or give security satisfactory to any two justices of the peace, or police justices in the city, village or town, to the overseers of the poor of the town, or in the city of

New York, to the commissioners of charities and corrections, that the spouse or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

§925. The officers must sell at public auction the property ordered to be sold and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor, the officers charged therewith must apply the same to the support of the wife or children so abandoned; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statutes. They must also account to the county court of the county for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time.

§926. When the poor person for whom relief is sought is a charge upon a county, the superintendent of the poor are vested with the same powers, as are given by this title to the overseers of the poor of a town, in respect to compelling relatives to maintain poor persons, and abandoning his family; and are entitled to the same remedies in their names, and must perform the duties required by this title, of overseers, and are subject to the same obligations and control.

Greater New York Charter

§103. The head of the department of public welfare shall be called the commissioner of public welfare.

§657. The department of public charities shall be known as the department of public welfare and wherever in this charter or in any general or special statute where the term department of public charities shall be used it shall be deemed to mean department of public welfare.

§658. The head of the department of public charities shall be called the commissioner of public charities * * *.

§659. * * * The commissioner shall have power to appoint and in his discretion to remove not more than three deputies * * *.

The commissioner may, also, in writing delegate any portion of his powers, or duties, to a deputy commissioner designated by him, to be exercised by such deputy commissioner for such time, and to such extent, as shall be specified in such written delegation * * * *.

§662. The commissioner of public charities shall have all the authority concerning the care, custody and disposition of * * * destitute persons heretofore conferred upon the board of public charities and upon the several commissioners of public charities * * *. The commissioner shall be the overseer of the poor of The City of New York, as constituted by this act. * * * The commissioner shall make provision for the temporary care of vagrant and indigent persons, and shall provide for an investigation into the circumstances of all such persons, and shall cause every person who is found upon investigation to be a vagrant, to be brought before a magistrate pursuant to law * * *.

§664. The commissioner or deputy commissioner of public charities shall have power to commit, to indenture, place out, discharge, or transfer any child who may be in his custody, or who may have been placed by him in an institution as a public charge, * * *.

§665. Whenever any child, actually or apparently, under the age of sixteen years, is brought before any court or magistrate in The City of New York, as constituted by this act, pursuant to section eight hundred and eighty-eight of the code of criminal procedure, or is found destitute of means of support the magistrate presiding, or court before whom or which such child is brought shall thereupon fix a day more than five days distant for the hearing and final disposition of the charge against said child, and shall, at the same time, in addition to such other notices as may be required by law, give notice, in writing, of such arrest to the commissioner of public charities and to the Society for the Prevention of Cruelty to Children duly authorized to carry on its work in the county in which said arrest is made, which notice shall state the name of the child, its age, either actual or apparent, its sex, color, birthplace, residence, father's name, mother's name, parents' religion and parents' occupation, each if known; the specific charge upon which the arrest is made; the name of the officer making the arrest, and the name and address of the complaining witness, if any there be. Any such court or magistrate may temporarily commit such child to the custody and care of an institution to which said court or magistrate is authorized by law to make final commitment.

§666. The commissioner may appear either by clerk or by counsel on all hearings or proceedings for the commitment of children. He shall investigate the circumstances of their relatives, whose duty it is to relieve and maintain them, and shall on or before the final hearing therein, file with the Court or Magistrate a statement in writing of such fact or facts as in the opinion of the commissioner render it proper or improper

that such child should be supported as a public charge at the expense of the city; and such written statement of fact or facts when so filed shall be preserved with and form a part of the record of the proceedings instituted by the arrest of such child. Omission or failure to file such statement shall not be ground for delaying the final decision.

§683. The parents, grandparents, children and grandchildren, and husband or wife, of sufficient ability, of a poor person who is insane, blind, old, lame, sick, impotent or decrepit so as to be unable to work to maintain himself, and the parents and grandparents of a destitute child must at their own charge support him in a manner sufficient to prevent him from being, or to avoid the liability of his becoming, a charge upon the public.

If the relative of a poor person of sufficient ability fails to support him as in this section provided and the person is being cared for or is about to be cared for by the commissioner of public welfare of the city of New York, the commissioner of public welfare of such city by whom and in whose name the proceedings shall be conducted may apply to a city magistrate as provided by section seventy-four of chapter six hundred and fifty-nine of the laws of nineteen hundred and ten or to any court of record having jurisdiction of the defendant for an order to compel him to pay the reasonable charges determined by the commissioner of public welfare of the city of New York for the care of such relative during his stay in the public or private institution, or home where the commissioner of public welfare has placed him, and the proceedings to be taken to make such order and to enforce the same shall in all respects be similar to those provided in the code of

criminal procedure. The determination of the commissioner of public welfare as to the reasonableness of said charges may at any time be reviewed by any city magistrate or any judge of a court of record.

Evidence that the poor person mentioned in this section is without adequate means of support shall be presumptive proof of his liability to become a public charge. The relative against whom proceedings are begun for the support of a poor person shall be taken to be of sufficient ability to contribute to the support, unless the contrary shall affirmatively appear to the satisfaction of the court or a judge thereof.

* * * * * *

§1526. There shall be published daily, sundays and legal holidays excepted, under a contract to be made as hereinafter provided, a paper to be known as the City Record* * * *.

§1528. All printing for said city and for the counties contained within its territorial limits, including the printing of the City Record, shall be executed and all stationery shall be supplied, under contracts, to be entered into by the said board of the city record. * * * The said person appointed to supervise the publication of the City Record * * *, shall also cause to be printed in each issue of said City Record a separate statement of the hours during which all public offices in the city are open for business, and at which each court regularly opens and adjourns, as well as of the places where such offices are kept and such courts are held * * * *.

Inferior Criminal Courts Act of The City of New York

§72. The chief city magistrate and the city magistrates of the city of New York are magistrates within

the meaning of the provisions of the code of criminal procedure and the penal law, and the city magistrates' courts are police courts within the meaning of the provisions of the code of criminal procedure and the penal law. The chief city magistrate and the city magistrates have all the powers and jurisdiction possessed by city magistrates of the city of New York on the first day of April, nineteen hundred and ten. Each of said magistrates shall have jurisdiction throughout the city, and may perform any and all of the duties and functions of a magistrate in and for any one of the counties in said city; * * * *.

§74. a. On or after the first day of July, nineteen hundred and nineteen, there shall be held every day in the year, except Sundays and holidays, in the boroughs of Manhattan, the Bronx and Brooklyn, respectively, and in the other Boroughs of the City when the board of city magistrates so directs, a city magistrates' court which shall be designated the domestic relations court, to which shall be taken or transferred for arraignment, examination or trial, or to which shall be summoned, all persons described as disorderly in subdivision one of section eight hundred and ninety-nine of the code of criminal procedure, all persons compelled by law to support poor relatives, as provided by title eight of part six of the code of criminal procedure and all persons charged with abandonment or non-support of wives, children or poor relatives under any provision of law, conferring upon magistrates summary jurisdiction or authority to hold for trial in another court. The domestic relations court shall have the sole and exclusive jurisdiction to initiate, investigate, try, hear and determine all proceedings and charges against any such persons alleged to be disorderly persons under this section. The following persons are

declared to be disorderly persons: Every person in the city of New York who

Actually abandons his wife or children without adequate support; or

Leaves them in danger of becoming a burden upon the public; or

Who neglects to provide for them according to his means; or who threatens to leave his wife or children without adequate support, or in danger of becoming a burden upon the public; or

Who shall have abandoned his wife or children in any other place and is found in the city of New York, when his wife or children are residents thereof and without adequate support, or in danger of becoming a burden upon the public; or

Who, by reason of his conduct, or of his cruel or inhuman treatment, or by reason of his neglect or refusal to provide his wife or children with the necessaries of life, renders it unsafe, improper or impossible for them to live with him, by reason of which they are without adequate support or in danger of becoming a burden upon the public; or

Who fails to support his wife or children when his wife has secured a decree of separation by reason of which they are without adequate support or in danger of becoming a burden upon the public; or the

Parents, grandparents, children and grandchildren of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself, and the parents and grandparents of a destitute child, who at their own charge shall fail to support him in a manner sufficient to prevent him from being, or to avoid the liability of his becoming a charge upon the public.

b. Upon a complaint made under oath to him, against the person as being disorderly, a city magistrate presiding in a domestic relations court, in a borough in which such court is held, and in other boroughs of the city of New York, a city magistrate presiding in any city magistrates' court therein, may issue a warrant for the arrest of the defendant, or, in his discretion a summons in substance in the form provided by section eighty-two of this act. Upon his arrest or appearance the defendant shall be arraigned in the manner provided by law. All proceedings against disorderly persons shall be brought in the name of the city of New York as complainant.

c. Service of warrants. Service of warrants, summonses and all process issued from said court, or any magistrate presiding therein, may be made at any time, when so ordered by the magistrate issuing the same, or presiding therein.

Whenever a warrant is issued for the arrest of a defendant and the whereabouts of the defendant is unknown, the clerk of the said court may issue a certificate evidencing the issuance thereof to the complainant, upon which, any police officer, shall arrest the person named in said certificate as under a warrant. The clerk of the said court is empowered to take affidavits and acknowledgements of the undertaking and all abandonment and nonsupport or other cases, in said court, and subpoenas and summonses issued by the said court shall be signed by the clerk of the said court, or such assistant clerk as may from time to time be designated by the chief city magistrate. If, for any reason, the person charged cannot be arraigned before the magistrate presiding in said domestic relations court, then said arraignment may be made before the most accessible magistrate,

and the production of the warrant directing the arrest of said person aforesaid before the said magistrate shall be presumptive evidence to said magistrate of the filing of a proper information for the issuance of said warrant, and said magistrate shall thereupon admit to, fix and accept bail, or parole the defendant for trial before the said domestic relations court; and in default of giving such bail, or in case said defendant is not paroled, the said magistrate shall hold the said defendant for examination before the magistrate presiding in said domestic relations court respectively and all subsequent proceedings in said proceeding shall be had before the magistrate presiding in said domestic relations court. If upon examination of said defendant, it shall appear by the confession of the defendant, or by competent testimony, that he is a disorderly person, the said magistrate shall make an order specifying a fair and reasonable sum of money according to his financial ability, to be paid weekly or otherwise by said defendant to the court unless otherwise ordered for the support of his wife, children, parent, grandparent, grandchildren or poor relative, as the case may be, and may require him to give security by a written undertaking to the city of New York, with sufficient surety approved by the magistrate to that effect, or in lieu thereof may deposit with the clerk of the said court in cash or liberty bonds. Upon the consent of the defendant the magistrate may without convicting the defendant of being a disorderly person make an order herein which shall be enforceable in all respects as under an order made after conviction. Said magistrate shall have full power and authority to administer an oath to said principal and surety in such undertaking as to the truth of the statements therein and any justification of the statement attached thereto or accompanying the same with full power and authority to take acknowledgment

thereto of any of the parties to the same with like power and effect as if sworn to and acknowledged before a notary public in any county wherein the same may be taken or acknowledged. Any magistrate of the city of New York shall have power to take the security aforesaid with like power and authority as if he made the order aforesaid. The wife, children, parent, grandparents, grandchildren or poor person aforesaid, is hereby declared to be a primary beneficiary of the order, and evidence that they are without means shall be presumptive proof of their liability to become a charge upon the public; and the person against whom proceedings are begun as a disorderly person shall be taken to be of sufficient financial ability to contribute to the support of the wife, children, parent, grandparents, grandchildren, or poor person as the case may be unless the contrary shall affirmatively appear to the satisfaction of the court or judge thereof. Upon the trial of all complaints herein the wife shall be a competent witness against her husband as to all matters embraced in said complaint. If the undertaking be given or cash or liberty bonds be deposited, the defendant must be discharged; but if not, the magistrate must convict him as a disorderly person and must make up and sign with his title of office and file in the office of the clerk of the county in which such conviction is had, a record of the conviction of such offender as a disorderly person, specifying generally the nature and circumstances of the offence and the name of the witnesses by whom it has been established, and shall by a warrant of commitment signed by him with his title of office commit the defendant to the workhouse of the city of New York; or to the board of inebriety of the city of New York; or to such other officer, board or person as shall take over the duties of said board of in-

ebriety, or to the city prison or jail in the borough where the conviction is had pending his transportation to the workhouse or to the custody of the board of inebriety of the city of New York; or such other officer, board or person such as shall take over the duties of said board of inebriety, if necessary, for such term as the magistrate may deem proper, not exceeding one year, until he give the security prescribed by the order or judgment of conviction or be discharged according to law. But such term of imprisonment shall not preclude the magistrate from recommitting the defendant for any subsequent violation of the order. The board of inebriety of the city of New York, or such officer, board or person, such as shall take over the duties of said board, is hereby authorized to receive all persons committed as aforesaid. The magistrate may, in his discretion, place any defendant adjudged guilty by him on probation in accordance with the provision of this act so far as the same can be applied, or in pursuance of the code of criminal procedure. Further, upon the consent of the defendant, the magistrate may, before conviction, place the defendant under probationary oversight on the same terms and conditions as on probation for such term as the magistrate may deem advisable, and adjourn the proceeding from time to time; or he may take from the defendant an undertaking to the city of New York for said period, with or without security, in a sum fixed by said magistrate. The condition of said undertaking shall be such as said magistrate may direct, and if complied with said obligation shall be void; otherwise, to remain in full force and effect. The magistrate making the order or judgment of conviction, or the magistrate sitting in the court where the order was made, may at any time thereafter, upon due notice to the parties, either upon their consent or for good cause shown, vacate or modify

the order by increasing or decreasing the terms thereof, and may, if the defendant be imprisoned, either discharge the defendant absolutely from imprisonment or place him upon probation; or if the defendant be not imprisoned, may cancel any undertaking given therein. Upon arraignment the defendant may be paroled by the magistrate presiding for his appearance for trial, or the said defendant may be admitted to bail for his appearance at said trial in such amount as said magistrate may deem proper. If the defendant be admitted to bail for his future appearance as aforesaid, the condition of the undertaking shall be for the future appearance of the defendant according to the terms thereof or in default thereof the surety will pay to the clerk of the domestic relations court aforesaid a specified sum, which sum shall be therein set forth. Intsead of entering into such an undertaking a defendant may deposit in lieu thereof cash or liberty bonds in an amount to be fixed by said magistrate with the clerk of the domestic relations court, or such assistant clerk thereof as may be designated for that purpose by the chief city magistrate. Any magistrate of the city of New York shall have the power to admit to, fix and accept bail. If such bail be accepted by him he shall cause the same to be transmitted to the clerk of the domestic relations court from which the warrant was issued within twenty-four hours from such acceptance of said bail. If such defendant be arraigned before such magistrate he shall have power to parole said defendant. If the defendant fails to appear when paroled, or in accordance with the terms of said undertaking, or the terms upon which the money or liberty bonds was deposited, the magistrate presiding in the domestic relations court shall enter the fact of such non-appearance upon the minutes of the undertaking for his appearance or the money or liberty bonds deposited in

lieu thereof shall, in the discretion of the magistrate, thereupon be forfeited subject to the right of the magistrate presiding in the domestic relations court to remit the forfeiture.

The magistrate shall also have power to issue a warrant for the rearrest of defendant. In case of forfeiture of cash bail, or liberty bonds, and no order to remit the same as aforesaid is made, the same shall be applied by the clerk of the court of domestic relations for the benefit of the wife, child, children, grandchild or children, parent, grandparent or poor relative of the defendant, as the case may be, in such proportion and in such manner as the magistrate presiding in domestic relations court shall direct.

Every action brought upon any undertaking given in an abandonment proceeding against a disorderly person shall be brought in the name of the city of New York, and in such action it shall not be necessary to prove the actual payment of money to the beneficiary; but the neglect to pay the sum ordered to be paid shall be a breach of the undertaking, and the measure of damages shall be the sum ordered to be paid and withheld at the time of the commencement of the action with interest thereon. After the recovery of damages or the commencement of the action, another action may be brought for a breach of the undertaking. All monies recovered in any action shall be paid to the clerk of the domestic relations court, in which the proceeding is had, to be by him expended for the support of the wife, child, children, grandchildren, parent, grandparent or poor relative, as the case may be, of the person against whom the order herein has been made; provided, however, that a surety on an undertaking given as aforesaid to secure the support of said wife, child, children, grandchildren, parent, grandparent or poor relative heretofore named may at any time surrender the

defendant to the magistrate presiding in the court where the order was made, who shall hold him as provided in said order, and thereupon said surety shall be relieved of any damages upon the undertaking except the sum to be paid and which was withheld at the time of surrender, with interest; provided further, that said magistrate presiding shall not be compelled to except such surrender unless the amount due by the defendant at the time of the surrender is paid to the court.

Upon the forfeiture of an undertaking given in a proceeding against a disorderly person as provided in this section, the corporation counsel of the city of New York shall cause to be filed in the office of the clerk of the respective counties of the city of New York in which said undertaking may have been taken, said undertaking together with a certified copy of the order of the court forfeiting the same, and thereupon the said Clerk shall docket the same in the book kept by him for the docketing of judgments, transcripts whereof are filed with him as such clerk, as if the same was a transcript of a judgment directed for the amount of the penalty, and the undertaking and a certified copy of the order forfeiting the same shall be the judgment record; such judgment shall be a lien on the real estate of the persons entering into such undertaking, from the time of filing said undertaking and a copy of the order and docketing the same, as in this section directed; an execution may be issued to collect the amuont of said undertaking in the same form as upon a judgment, recovered in any court of record in said counties, respectively. The amount recovered on said undertaking and judgment aforesaid shall be applied and expended for the support of the wife and children, grandchildren, parent, grandparent or poor person, as the case may be, of the person charged with the offenses hereinbefore recited, by said

clerk aforesaid under direction of said magistrate presiding, and when any money has been deposited as bail with any other person than said clerk aforesaid and which shall have been forfeited as hereinbefore provided, said money shall be paid to the clerk of the domestic relations court aforesaid by the person with whom said sum of money is deposited, upon presenting to him a certificate from the city magistrate who made the order of forfeiture certifying to the forfeiture thereof, or the magistrate presiding with said domestic relations court, which said certificate shall state the name of the person making the deposit, when it is made, the name of the defendant, and that the sum of money was forfeited on account of the defendant's failure to appear as directed and shall be signed by the said magistrate.

d. Appeals in disorderly persons proceedings. An appeal from an order, decision or judgment under this section may be taken either by a defendant or by the complainant to the court of special sessions as provided by section ninety-four, except that the court allowing the appeal on behalf of the defendant must take from the defendant a written undertaking to the city of New York in such sum and with such sureties as he may approve, or in lieu thereof a deposit of cash or liberty bonds, that the defendant will abide the judgment of the appellate court upon the appeal, and except that all notices required by law to be served upon the district attorney upon an appeal shall upon such appeal be served upon the corporation counsel of the city of New York. If the defendant has given an undertaking to comply with the order of the domestic relation court or has deposited cash or liberty bonds in lieu thereof no undertaking on appeal shall be required. No appeal taken by defendant under this section shall operate as a stay of proceedings and no stay herein shalll be granted.

If a new trial be ordered it must be had in the court from which the appeal was taken. When the appeal is taken by the complainant the affidavit for the allowance of the appeal shall be made by, and all other proceedings shall be taken by the corporation counsel.

If the judgment on the appeal be against the complainant the complainant may appeal therefrom to the appellate division of the supreme court in the same manner as the defendant. (Subd. d., amended by L. 1922, Ch. 595, in effect July 1, 1922.)

e. When new security may be required after an order in disorderly persons proceedings. After an undertaking has been given by the defendant in a disorderly persons proceedings as herein provided upon proof by affidavit that diligent efforts have been made to serve personally upon the surety upon such undertaking a summons in an action brought thereon for a default in the terms thereof, but that such service upon such surety cannot be affected or that a recovery cannot be had thereon; or that the judgment obtained upon such undertaking remains wholly unsatisfied and unpaid; or that a surety has been adjudged a bankrupt; or upon the decease of such surety, the city magistrate sitting in the court where the final order was made may issue a warrant for the arrest of the defendant in whose behalf the undertaking was given, and require him to give new security, or in default thereon may commit him under the original order in the manner herein prescribed.

* * * * * *

Judiciary Law

§190. The county judge must, from time to time, appoint the times and places for holding the terms of his court * * * *.

§191. Each term must be held at the place designated by statute for that purpose, * * * *.

§192. Each appointment made as prescribed in sections one hundred and ninety and one hundred and ninety-one of this chapter, must be filed in the county clerk's office, and a copy thereof published at least once in each week for three successive weeks before a term is held * * * by virtue thereof, in the newspapers in the City of Albany, designated pursuant to Section eighty-two of the executive law and also in at least one newspaper published in the county, and as many additional newspapers, published therein, as the county judge prescribes.

Penal Law

§481. A parent, or other person having the care or custody, for nurture or education, of a child under the age of fourteen years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment in a state prison for not more than seven years.

§482. A person who:

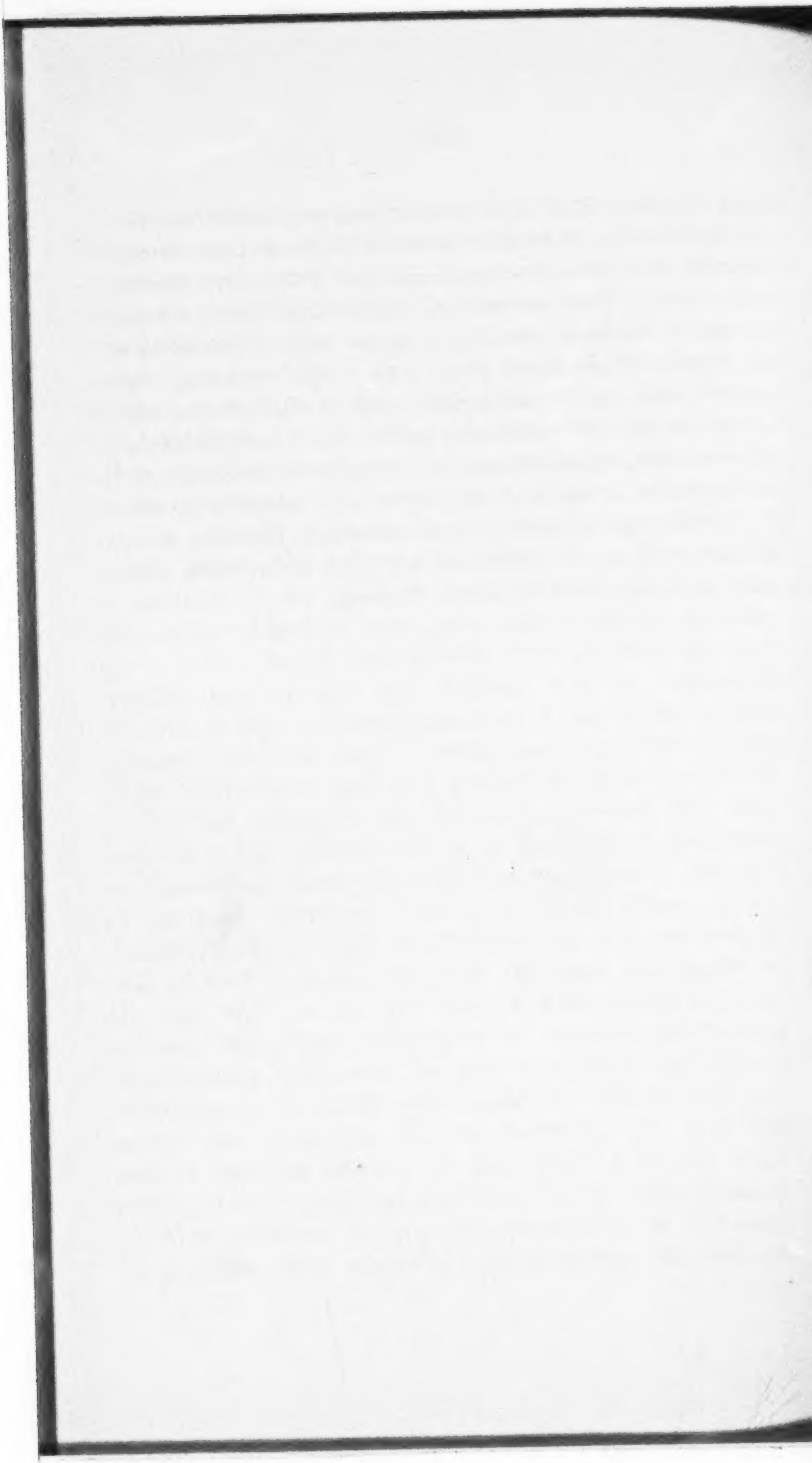
1. Wilfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor, or to make such payment toward its maintenance as may have been required by the order of a court or magistrate when such minor has been committed to an institution; * * *.

Poor Law

§2. "A poor person" is one unable to maintain himself, * * *.

§130. Whenever the father * * * has absconded or shall abscond from his or her children, or a husband from his wife, * * * leaving any of such children or such wife chargeable, or likely to become chargeable upon the public for their support, and any real or personal estate of such father, or * * * husband, has been or shall be seized by a superintendent of the poor or an overseer of the poor, or by a board of charities, or by other officers authorized to make such seizure, by warrant of the justices of the peace of the county where such real or personal property may be situated, and the * * * county court of the county wherein such superintendent or overseer of the poor, or board of charities, or other officers authorized to make such seizure resides, or other court having jurisdiction thereof, has confirmed, or shall confirm said warrant and seizure, and has heretofore directed or shall hereafter direct what part if any of said personal property shall be sold, and how much if any of the proceeds of such sale and of the rents and profits of the real estate, if any, be applied toward the maintenance of the children or wife or husband of the person so absconding; then the said superintendent or overseer of the poor, board of charities or other officers so authorized and directed, shall apply the said proceeds of sale of said personal property, or rents and profits of the real estate as the case may be, first, to the payment of such taxes and assessments as may be outstanding and existing liens upon the said real estate, and repairs necessary to be made upon said real estate, and premiums for insurance on the buildings on said real estate; and the balance, if any, directly to the maintaining, bringing up and providing for the wife, husband, child or children so left and abandoned, as the same be required from time to time; and for all such ex-

penditures they shall take proper vouchers and from the rents and profits thereafter received from any real estate so seized they shall first pay all legal taxes and assessments, as they shall be assessed against said real estate, and such premiums for insurances and expenses for such repairs thereon as they may deem necessary for the protection and preservation of said real estate, and the balance of said rents and profits shall be applied by said overseers, superintendents, boards of charities, or other persons authorized to make such seizures, to the maintaining, bringing up, and providing for the wife, husband, child or children so left and abandoned, and proper vouchers shall be taken thereof.



SUPREME COURT OF THE UNITED STATES.

No. 36.—October Term, 1929.

The Corn Exchange Bank, Appellant,
vs.
Bird S. Coler, Commissioner of Public Welfare of the City of New York.

Appeal from the Court of Appeals of the State of New York.

[January 6, 1930.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Commissioner of Public Welfare complained to the Domestic Relations Court that while residing with them in New York City Raffaele De Stefano abandoned his wife and infant child and absconded from the State, leaving them without means and likely, unless relieved, to become public charges. Upon the wife's supporting affidavit two magistrates of the court issued a warrant authorizing seizure of all the absconding husband's right, title and interest in his deposit with appellant Bank and make return to the County Court. After service and demand the Bank refused to pay. Thereupon, the Commissioner by complaint in the City Court sought to reduce the fund to his possession. The Bank moved for judgment upon the ground that the statute—basis of the warrant—failed to provide for notice, either actual or constructive, to the absconder, and could not be enforced without denying the due process of law guaranteed by both State and Federal constitutions. It prevailed in the City Court. The Appellate Term reversed that action and directed judgment for the Commissioner, and this was approved by the Court of Appeals.

Sections 921, 922, 923, 924, 925, New York Code of Criminal Procedure, under which the original warrant issued, provide in substance:—That the Commissioner of Public Welfare may apply to two magistrates for a warrant to seize the property of an absconding husband or father leaving wife or child likely to become charges on the public; that upon due proof of the facts, the warrant may be issued; that the officer receiving it may seize the property wherever found within his county; and shall be vested with all the rights

and title thereto which the person absconding then had; that return of all proceedings under the warrant shall be made to the next term of the County Court; that thereupon that court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; that in the event of confirmation the court shall from time to time direct what part of the property shall be sold, and how the proceeds shall be applied to the maintenance of spouse or children; and on the other hand that if the party against whom the warrant has issued shall return and support the spouse or children so abandoned, or give satisfactory security for such support, then the warrant shall be discharged, and the property restored.

The Court of Appeals ruled that jurisdiction of the magistrates to issue the warrant and of the County Court to enter a confirmatory judgment depend upon existence of the relation sought to be regulated; that "the victim of the seizure may nullify the whole proceeding, including any adjudication attempted in his absence, if there is lacking the jurisdictional relation which is the basis of his duty." Thus limited, it upheld the enactment as a proper regulation of family relation and affirmed the judgment in the Commissioner's favor for the amount claimed in his complaint.

The challenged procedure is an ancient one. In 1718 the Parliament of England enacted a statute reciting a like ill and prescribing like remedy. The New York Colonial Legislature passed a substantially similar law in 1773; the State Legislature in 1784, and again in 1788. This passed into the Revised Laws of 1813; afterwards, broadened to subject choses in action to seizure, into the Revised Statutes of 1829. Without material change it has continued in effect, and has been enforced unquestioned until the present action.

In *Ownbey* v. *Morgan,* 256 U. S. 94, 112, we upheld certain rather harsh legislation of the State of Delaware modeled on the custom of London and dating back to Colonial days. Its validity, challenged because of alleged conflict with the due process clause of the Fourteenth Amendment, was sustained because of the origin and antiquity of the provisions.

> "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirma-

tive, and it carries no mandate for particular measures of reform. For instance, it does not constrain the States to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to make amendments. Neither does it, as we think, require a State to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Following the reasoning of that cause we think the statute here under consideration cannot be said to offend the Federal Constitution.

That the appellant Bank under some remote possibility may be called upon to pay a second time is true; but when voluntarily contracting with the depositor it knew this and accepted the consequent responsibility. Under the approved practice there was abundant opportunity to make defense—to require proof of all essential facts. At all events, its position is not materially worse than that of a debtor who must pay one who holds letters testamentary issued upon proof of death, though in truth the creditor may be alive with power to repudiate the appointment. See *Scott* v. *McNeal*, 154 U. S. 34.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.